DOCUMENT RESUME

ED 467 452 CG 031 861

TITLE	Faith-Based Solutions: What Are the Legal Issues? Hearing before the Committee on the Judiciary. United States Senate, One Hundred Seventh Congress, First Session (June 6, 2001).
INSTITUTION	Congress of the U.S., Washington, DC. Senate Committee on the Judiciary.
REPORT NO	Senate-Hrg-107-375
PUB DATE	2002-00-00
NOTE	92p.; Serial No. J-107-24. Contains small print.
AVAILABLE FROM	U.S. Government Printing Office, Superintendent of Documents, Mail Stop SSOP, Washington, DC 20402. Tel: 866-512-1800 (Toll Free); Tel: 202-512-1800; Fax: 202-512-2250; Web site: http://bookstore.gpo.gov/. For full text: http://www.access.gpo.gov/congress/senate.
PUB TYPE	Legal/Legislative/Regulatory Materials (090)
EDRS PRICE	EDRS Price MF01/PC04 Plus Postage.
DESCRIPTORS	Civil Rights; Constitutional Law; Financial Support; *Government Role; Hearings; *Legal Problems; *Philanthropic Foundations; Public Policy; Religious Discrimination; *Religious Organizations; *Social Services; State Church Separation
IDENTIFIERS	Congress 107th

ABSTRACT

This document presents witness testimonies addressing faith-based charities that offer critically needed social services through publicly funded and professionally managed programs. Specifically, the hearing discusses the possibility of extensive expansion of government involvement in faith-based charities, and some of the legal and policy concerns that have been raised about proposed expansions of charitable choice by religious leaders, civil rights leaders, and American citizens. Following opening statements from Senators Orrin G. Hatch, Patrick J. Leahy, and Arlen Specter, witnesses present testimonies on their experiences, thoughts, and concerns regarding the charitable choice approach to government funding of social services. The panelists included Rev. Charles Adams, Hartford Memorial Baptist Church; John L. Avery, National Association of Alcoholism and Drug Abuse Counselors; Nathan J. Diament, Union of Orthodox Jewish Congregations of America; Carl H. Esbeck, Department of Justice; Rev. W. Wilson Goode, Amachi Program; Wade Henderson, Leadership Conference on Civil Rights; Douglas Laycock, University of Texas; Edward Morgan, Christian Herald Association; Hon. Rick Santorum, U.S. Senator from Pennsylvania; Hon. Robert Scott, U.S. Representative from Virginia; Rev. Eliezer Valentin-Castanon, United Methodist Church; and Rabbi David Zwiebel, Agudath Israel of America. (GCP)

Reproductions supplied by EDRS are the best that can be made
from the original document.

ED 467 452

Faith-Based Solutions: What are the Legal Issues?

Hearing before the
Committee on the Judiciary
United States Senate
107th Congress
First Session

June 6, 2001

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☐ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.

- Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

CG031861

BEST COPY AVAILABLE

CG

S. Hrg. 107–375

FAITH-BASED SOLUTIONS: WHAT ARE THE LEGAL ISSUES?

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

JUNE 6, 2001

Serial No. J–107–24

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
78–596 PDF WASHINGTON : 2002

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

PATRICK J. LEAHY, Vermont, *Chairman*

EDWARD M. KENNEDY, Massachusetts
JOSEPH R. BIDEN, JR., Delaware
HERBERT KOHL, Wisconsin
DIANNE FEINSTEIN, California
RUSSELL D. FEINGOLD, Wisconsin
CHARLES E. SCHUMER, New York
RICHARD J. DURBIN, Illinois
MARIA CANTWELL, Washington

ORRIN G. HATCH, Utah
STROM THURMOND, South Carolina
CHARLES E. GRASSLEY, Iowa
ARLEN SPECTER, Pennsylvania
JON KYL, Arizona
MIKE DEWINE, Ohio
JEFF SESSIONS, Alabama
SAM BROWNBACK, Kansas
MITCH McCONNELL, Kentucky

BRUCE A. COHEN, *Majority Chief Counsel and Staff Director*
SHARON PROST, *Minority Chief Counsel*
MAKAN DELRAHIM, *Minority Staff Director*

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

Page

Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah 7
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont 1
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania 22

WITNESSES

Adams, Charles, Rev., Pastor, Hartford Memorial Baptist Church, Detroit, Michigan 46
Avery, John L., Government Relations Director, National Association of Alcoholism and Drug Abuse Counselors, Alexandria, Virginia 61
Diament, Nathan J., Director of Public Policy, Union of Orthodox Jewish Congregations of America, Washington, D.C. 66
Esbeck, Carl H., Senior Counsel to the Deputy Attorney General, Department of Justice, Washington, D.C. 22
Foltin, Richard T., Legislative Director and Counsel, American Jewish Committee, Washington, D.C. 81
Goode, W. Wilson, Sr., Rev. Dr., Senior Advisor on Faith-Based Initiatives, Public/Private Ventures, and Rector, Amachi Program, Philadelphia, Pennsylvania 42
Henderson, Wade, Executive Director, Leadership Conference on Civil Rights, Washington, D.C. 65
Laycock, Douglas, Alice McKean Young Regents Chair in Law, University of Texas, Austin, Texas 74
Morgan, Edward, President, Christian Herald Association, New York, New York 59
Santorum, Hon. Rick, a U.S. Senator from the State of Pennsylvania 10
Scott, Hon. Robert C., a Representative in Congress from the State of Virginia 13
Valentin-Castañon, Eliezer, Rev., Program Director, General Board of Church and Society, United Methodist Church, Washington, D.C. 51
Zwiebel, David, Rabbi, Executive Vice President for Government and Public Affairs, Agudath Israel of America, New York, New York 47

QUESTIONS AND ANSWERS

Responses of Richard T. Foltin to questions submitted by Senator Leahy 83
Responses of Richard T. Foltin to questions submitted by Senator Kennedy 85

FAITH-BASED SOLUTIONS: WHAT ARE THE LEGAL ISSUES?

WEDNESDAY, JUNE 6, 2001

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:02 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Biden, Schumer, Durbin, Hatch, Specter, Sessions, and Brownback.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. The Committee will be in order.

I wanted to follow a tradition that I have followed now for 20-some-odd years. I have chaired probably half a dozen different Committees at different times. I have been twice in the minority, three times in the majority, which gives you some indication of how the Senate changes all the time. What I have always done is started a new Committee with a gavel that my son made for me in high school. I know I embarrass him every time I mention that, but this is the gavel I have always used and so that is where we will start.

I would say to my friend, Senator Hatch, we are starting with this hearing out of courtesy both to him and to President Bush, even though we have not yet reorganized the Senate.

Senator Hatch and I have joined with Senators Biden, DeWine, Thurmond and Feinstein to introduce S. 304, the Drug Abuse Education, Prevention, and Treatment Act. It takes a very comprehensive approach to the drug problems that most affect our communities. It is designed to reduce illegal drug use and to provide appropriate drug education, prevention, and treatment programs.

Senator Hatch wanted the charitable choice language to be included in the bill and he had been planning this hearing earlier this year. He had had to postpone earlier to accommodate my schedule. I am proceeding with it this morning to accommodate him. He had done the planning as chairman, and he did it in furtherance of our common interest in passing this anti-drug legislation. As it was on the schedule, I wanted, as I said, to accommodate him and go forward.

Now, I also wanted to demonstrate at the outset my intention to find ways to work constructively with the Bush administration. When I chaired this Committee in the early days of this Congress, we proceeded with expeditious hearings on the President's nomination of John Ashcroft to be Attorney General. Because we did that, we were able to move on the floor of the Senate Senator Ashcroft's nomination within 48 hours of the time his papers actually came up here from the White House. So within 48 hours of the time his nomination hit the Senate, with the unanimous approval to move forward of both Democrats and Republicans, we did that.

President Bush has a faith-based initiative. I believe this is probably going to be the first Senate hearing on the President's administration priority. I have made clear some of my concerns and reservations about this proposal, but we are trying to find some common ground here and that is why we are going forward.

The Hatch-Leahy anti-drug abuse legislation is an important effort. I think we can make progress in the fight against drugs by using it. In fact, I have every intention of moving forward on judicial nominations within a couple of weeks of the time the Senate has been reorganized.

Long before Congress passed the first charitable choice provision in 1996, the Federal Government and the States had established strong cooperative relationships with a broad range of faith-based charities. Indeed, many faith-based charities receive millions, or even billions of dollars a year in Government funds today without any new initiative.

We owe a debt of gratitude to groups like Catholic Charities and the United Jewish Communities, among others, that offer critically needed social services through publicly funded and professionally managed programs. Given the success of these programs, I have to ask why we need extensive expansion of Government involvement in faith-based charities. I want to know just what is the problem we are trying to fix, and I hope our witnesses will tell us that.

We could also use the hearing to address some of the serious legal and policy concerns that have been raised about proposed expansions of charitable choice by religious leaders, civil rights leaders, and ordinary Americans across the country.

I have more in my written statement, but among those concerns is the impact of charitable choice on religion. There is an old saying about a certain road that is paved with good intentions and where it leads to. Charitable choice may be well-intentioned, but I do have grave concerns about where it may lead us.

I will include in the record a letter signed by almost 1,000 religious leaders from across the theological spectrum who say that charitable choice poses a danger to religion because the flow of Government dollars and the accountability for how those funds are used will inevitably undermine the independence and integrity of houses of worship.

When so many of our religious leaders reject a proposal that is purportedly designed to help religious organizations, I think we in Congress should at least listen. No matter how we feel about this proposal, we do know, and I think we all agree—whether we are supporters or opponents of this, we all know that we do not want Government meddling with our religion, whatever religion we have.

According to a recent report by the Pew Forum, most Americans, 68 percent, worry that faith-based initiatives will lead to inappropriate Government interference with religious organizations. I worry that an expansion of charitable choice could harm religion in other ways, and we should consider how Government funding of religious charities will affect the spirit of giving that we now see in this country.

Some ministers predict that an infusion of Government funding will result in a decrease of volunteerism within their congregations. The congregation would think that they don't need to give money. Charitable organizations have already suffered one financial blow this year in the form of estate tax repeal. According to the Treasury Department, this legislation will reduce charitable giving by as much as $6 billion a year, and that is lot less money for some of the social programs that faith-based organizations now conduct.

There are also questions about how current charitable choice proposals will affect State licensing and certification requirements. In 1997, then Governor Bush sponsored laws in Texas that exempted faith-based drug treatment and child care centers from State health and safety regulations, and now we are seeing the results of that.

At one center for troubled youth, a girl was bound with rope and duct tape. At another, police arrested the supervisor for unlawful restraint after he allegedly roped two children together and made them dig in a sewage pit. There was no supervision because there was an exemption for faith-based organizations.

Many social service providers require specialized training to address the medical needs of their patients; in drug treatment, for example, the programs established in S. 304. Drug addiction is a medical disease that has established medical treatments. Spiritual instruction may be fine, but it alone cannot adequately address the medical needs of the addicted person. We must make sure that if a faith-based organization receives Federal funds they are held to the same standards of licensing and expertise and all that their secular counterparts would.

Then, of course, there is the constitutional question. Does the Establishment Clause permit public money to flow directly to churches, synagogues, mosques, and other houses of worship? In the past, the Supreme Court has considered direct financial aid of the sort contemplated by charitable choice to be unconstitutional.

In Texas, an employment program financed under charitable choice is now accused of proselytizing. The program bought Bibles for students, required them to study Scripture, and taught them "to find employment through a relationship with Jesus Christ." Probably a noble gesture, but many of the students claimed that they had been pressured to change their beliefs.

The Reverend John Castellani, the executive director of Teen Challenge, testified before a House Subcommittee last month on charitable choice. Teen Challenge offers a year-long residential drug treatment program which challenges the residents to embrace the Christian faith.

During his testimony, Castellani was asked if this would preclude participants from other faiths. He responded that it accepts anyone, including Jews, some of whom he said may have returned to Judaism, but some of whom become "completed Jews," meaning they have converted to Christianity.

Many people took a great deal of concern from that statement. Some might suggest that it is a terribly arrogant statement, basically saying that if you are a Jew and you do not convert to Christianity, then you are an incomplete Jew. I think that that may be a new tenet in one of the world's oldest religions. This sort of response has fueled concern that charitable choice will result in government-funded proselytizing. So these are things we have to look at.

I will submit for the record the written testimony of Dr. Derek Davis, of Baylor University, who is a leading expert on the religion clauses.

We have to ask does this ease back from our Nation's commitment to equal protection under the law. The charitable choice provisions now before Congress would give government-funded religious organizations an unprecedented exemption from the Federal civil rights laws.

Unlike other recipients of taxpayer dollars, faith-based social service providers would be entitled to discriminate on the basis of religious when hiring and firing staff. What does that mean?

The New York Times ran a story in April about a woman named Alicia Pedreira. She worked as a therapist at the Kentucky Baptist Home for Children. She was fired because the religious organization said that her beliefs did not reflect their core values. Is this discrimination on the basis of religion, or is religion being used as a pretext to discriminate against homosexuals?

By allowing discrimination on the basis of religion, we may open the door to other forms of discrimination, including race. As the New York Times noted, "In theory, an organization like Bob Jones University could receive public funds to hire employees while forbidding them to engage in interracial dating."

Religion plays a role in our society, and it can do that without undermining our anti-discrimination laws. I hold my religion deeply; I practice it faithfully, but I also keep it separate from my duties as a U.S. Senator and as one who must show equal deference to all people of this country.

Last year, we worked together on a bipartisan basis and we crafted a bill that protected religious liberty without sacrificing civil rights and we passed it, and I hope we can do that again. We need to work closely together.

I think this is an important issue, and I don't pretend to have all the answers, but I do think it is important enough that when Senator Hatch had asked to have this hearing, even though today was the first day of a different Senate, I felt both out of respect for his concern and my respect for him personally that we would go forward with this hearing.

[The prepared statement of Senator Leahy follows:]

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

We are proceeding with this hearing today out of courtesy to Senator Hatch and President Bush.

Senator Hatch and I have joined with Senators Biden, DeWine, Thurmond and Feinstein to introduce S.304, the Drug Abuse Education, Prevention, and Treatment Act of 2001, which takes a comprehensive approach to the drug problems that most affect our communities, with provisions designed to reduce illegal drug use and to provide appropriate drug education, prevention, and treatment programs.

Senator Hatch insisted that charitable choice language be included in the bill. Senator Hatch had been planning this hearing earlier this year and had to postpone it to accommodate my schedule. I am proceeding with it this morning to accommodate him, the planning he did when he thought that he would be chairing the hearing, and in furtherance of our common interest in passing our anti-drug legislation.

With all the recriminations that have been flying around over the last several days in connection with the shift in control in the Senate, I also wanted to demonstrate at the outset my intention to find ways to work constructively with the Bush Administration.

When I chaired this Committee in the early days of this Congress we proceeded with expeditious hearings on the President's nomination of John Ashcroft to be Attorney General. Having done so, we were in position to have this Committee and the Senate proceed promptly and without delay to consider and vote on the confirmation of the Attorney General as soon as the nomination was received.

President Bush has his Faith-Based Initiative and, I believe, this will be the first Senate hearing on that Bush Administration priority. I have tried to make clear and will again today my concerns and reservations about this proposal. But we are proceeding out of a willingness to discuss this matter, to consider it, and to try to find common ground with Senate Republicans and the Bush Administration. The Hatch-Leahy anti-drug abuse legislation is an important effort, and with it we can make new progress in the nation's fight against drug abuse.

If my willingness to proceed with this previously scheduled hearing is used against us or against the efforts of the Majority Leader to reorganize the Senate and its committees without complication and delay, I will have learned that no good deed will go unpunished by the Republican opposition, and I will not make that mistake again.

Consistent with the steps toward cooperation and progress that Majority Leader Daschle is leading and in contrast to the posture struck by Senator Lott's recent memorandum urging his side to wage war, fight and battle the Senate Democratic majority, we are marking the Senate's transition today on this committee with a hearing that takes full account of the interests of Republicans and the Republican administration.

Now to the matter at hand: Long before Congress passed the first charitable choice provision in 1996, the Federal Government and the States had established strong cooperative relationships with a broad range of faith-based charities. Indeed, many faith-based charities receive millions or even billions of dollars a year in government funds. We owe a debt of gratitude to groups like Catholic Charities and the United Jewish Communities, among others, that offer critically needed social services through publicly-funded and professionally managed programs. Given the success of these programs, we ask why we need extensive expansion of government involvement in faith-based charities. What exactly is the problem that we are trying to fix? I hope that our witnesses will speak to this basic question.

We should also use this hearing to address some of the serious legal and policy concerns that have been raised about proposed expansions of charitable choice by religious leaders, civil rights leaders, and ordinary Americans across the country. I discuss a number of concerns in my written statement, which I will make available and incorporate in the record.

Among those concerns are the impact of charitable choice on religion. There is an old saying about a certain road that is paved with good intentions. Charitable choice may be well intentioned, but I have grave concerns about where it may lead us. I will also include in the record a letter signed by 969 religious leaders from across the theological spectrum. These religious leaders say that charitable choice poses a danger to religion because "[t]he flow of government dollars and the accountability for how those funds are used will inevitably undermine the independence and integrity of houses of worship." When so many of our religious leaders reject a proposal that is purportedly designed to help religious organizations, we in Congress should proceed with great care.

Americans do not want the government meddling with their religion. According to a recent report by the Pew Forum, most Americans - 68 percent - worry that faith-based initiatives will lead to inappropriate government interference with religious organizations.

Expansion of charitable choice could harm religion in other ways. We should consider how government funding of religious charities will affect the spirit of giving that religious charities currently inspire. Some ministers predict that an infusion of government funding will result in a decrease of volunteerism within their congregations, because church-goers will get the impression that their small contributions of time and money are no longer needed. This would work against the stated goals of charitable choice.

Charitable organizations have already suffered one financial blow this year, in the form of the estate tax repeal. According to the Treasury Department, this aspect of the President's $1.35 trillion tax legislation will reduce charitable giving by as much as $6 billion a year. That means less money will be available for the sorts of social programs that the faith-based organizations currently operate.

There are also many questions about how current charitable choice proposals will affect State licensing and certification requirements. In 1997, then-Governor Bush sponsored laws in Texas that exempted faith-based drug treatment and child care centers from State health and safety regulations. We are starting to see the results of the Texas experiment. At one center for troubled youth, a girl was bound with rope and duct tape. At another, police arrested the supervisor for unlawful restraint after he allegedly roped two children together and made them dig in a sewage pit. These cases are very troubling.

Many social service providers require specialized training to address the medical needs of their patients. Take for example the drug treatment programs established by 5.304. Drug addiction is a medical disease, with established medical treatments. Spiritual instruction alone cannot adequately address the medical needs of the addicted person. We need to ensure that faith-based organizations that receive federal drug treatment funds are held to the same professional standards as their secular counterparts.

Then there are the constitutional questions. Does the Establishment Clause permit public money to flow directly to churches, synagogues, mosques, and other houses of worship? In the past, the Supreme Court has considered direct financial aid of the sort contemplated by charitable choice to be unconstitutional, because the government monitoring needed to prevent the use of public funds for proselytization creates excessive entanglement between government and religion.

In Texas, an employment program financed under charitable choice has been accused of proselytizing. The program bought Bibles for students, required them to study Scripture, and taught them "to find employment through a relationship with Jesus Christ." Many of the students claimed that they had been pressured by the program to join a church or change their beliefs.

The Reverend John Castellani, executive director of Teen Challenge, testified before a House subcommittee last month on charitable choice. Teen Challenge offers a year-long residential drug treatment program which, according to its web site, "challenge[s] the residents to embrace the Christian faith." During his testimony, Castellani was asked if his program would accept participants from other faiths. He responded that it accepts anyone, including Jews, some of whom return to Judaism, and some of whom become "completed Jews," meaning they have converted to Christianity. This sort of response has fueled concern that charitable choice will result in government-funded proselytizing. The constitutional issues posed by charitable choice are substantial, with substantial consequences for the relationship between church and state in America. I will submit for the record the written testimony of Dr. Derek Davis of Baylor University, a leading expert on the religion clauses, who examines these issues at greater length.

As we will explore today, charitable choice proposals also raise serious questions about our nation's commitment to equal protection under the law. The charitable choice provisions now before Congress would give government-funded religious organizations an unprecedented exemption from the federal civil rights laws. Unlike other recipients of taxpayer dollars, faithbased social service providers would be entitled to discriminate on the basis of religion when hiring and firing staff.

What does it mean to discriminate "on the basis of religion"? *The New York Times* ran a story in April about a woman named Alicia Pedreira. She worked as a therapist at the Kentucky Baptist Homes for Children, which receives State funds. She was fired because the religious organization said that employing a gay person was contrary to the organization's "core values." Is this discrimination on the basis of religion, or is religion being used as a pretext to discriminate against homosexuals? By allowing discrimination on the basis of religion, we may open the door to other forms of discrimination, including race. As the *Times* noted, "In theory, an organization like Bob Jones University could receive public funds to hire employees while forbidding them to engage in interracial dating."

Religion can certainly play a role in our society without undermining our antidiscrimination laws. We learned that last year, when we considered legislation to ensure the highest level of legal protection for the free exercise of religion. Members of this Committee, working together on a bipartisan basis, were able to craft a bill that protected religious liberty without sacrificing civil rights. I supported that legislation, and it passed Congress with the blessing of religious leaders and civil rights leaders alike. That experience should serve as a guide as we consider charitable choice.

I hope that in today's hearing, we can start to identify the problems that the faith-based initiative is trying to solve. If problems do exist, we should work to address them without running roughshod over the Constitution or our commitment to civil rights.

Most importantly, I hope this hearing allows us to move forward on 5.304 and pass this important drug treatment legislation through this Committee and through the Senate. This bill can do a world of good, and we should act on it promptly.

Chairman LEAHY. Senator Hatch?

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman. I want to thank you, and congratulations on becoming Chairman of this very important Committee. I look forward to working with you. I enjoy our relationship and we are good friends, and hopefully we can accomplish a lot together.

Senator BIDEN. If the Senator would yield for a second?

Senator HATCH. I would be happy to do so.

Senator BIDEN. It is obvious that we understand it is better to be lucky than good.

Chairman LEAHY. No. It is better to be a Vermonter than to be good.

[Laughter.]

Chairman LEAHY. Vermont is a very special place. You may have read a lot about it.

I am sorry. Go ahead, Orrin. I will stop if you stop.

Senator HATCH. I have to admit it is a very special place.

Senator BROWNBACK. I will agree with that.

Chairman LEAHY. Joseph Smith was born there, don't forget, don't forget. I was in the town of his birth on the day of his birthday about a week or so ago, Senator Hatch. I want you to know I was there.

Senator HATCH. You would do well to pay more attention to what he had to say.

[Laughter.]

Senator HATCH. We have been hearing more and more about charitable choice or faith-based solutions over the past several years. Of course, it was a policy endorsed wholeheartedly during the presidential campaign by both President Bush and former Vice President Al Gore.

Numerous faith-based groups and religious leaders have embraced the notion that sectarian groups should be allowed to competed on the merits for funding to administer secular services to the American public, if they can demonstrate that they meet the requirements provided in the programs.

Moreover, the American public overwhelmingly favors allowing faith-based groups to have the opportunity to provide social services to those in need. Although I have been one who is somewhat skeptical of the polls and polling data, it is interesting to note that according to a recent poll conducted by the independent Pew Research Center, 75 percent of the American public supports the concept of faith-based funding, while only 21 percent oppose it.

The Pew poll also found that the majority of both Republicans and Democrats strongly favored allowing churches and religious institutions to apply for Federal grants to provide services to the needy. Thus, this broad support for charitable choice crosses party lines and ideological differences, and the composition of our panelists today reflects this.

While Americans understand the need for faith-based programs, there are some who have raised concerns concerning the constitutionality of allowing faith-based groups to receive Government funds. But let's be clear about one thing: this issue has not been a partisan matter to date. Since 1996, charitable choice legislation has received bipartisan support from both Houses of Congress, as well as from the Clinton administration. These laws have allowed faith-based providers to compete for Federal grants to provide services such as job training and drug rehabilitation. Indeed, religious charities currently receive about $3 billion each year in Federal funds to administer certain social services.

President Bush has made the increased involvement of faith-based organizations to address some of our social problems a priority. Indeed, he created an Office of Faith-Based Services within the White House to give these bipartisan programs a higher profile.

The current debate centers around whether it is appropriate to remove restrictions from existing funding streams to allow more groups to help those who need help themselves. I believe that after careful consideration of all the various concerns, Americans who are most in need will benefit greatly from building further on our charitable choice programs, which President Clinton also supported.

A couple of months ago I, along with Senators Leahy, Biden and others, introduced the bipartisan S. 304, the Drug Abuse Education, Prevention, and Treatment Act of 2001 to shore up our National commitment to the demand reduction component of our National drug control strategy, which was mentioned by Senator Leahy.

We introduced this legislation because we know that in order to reduce effectively drug abuse in America, we need to increase the resources we devote to prevent people from using drugs in the first place and also break the cycle of addiction for those whose lives are devalued and consumed by these substances. It only seemed appropriate in expanding prevention and treatment programs that we tap every resource available to carry out these important services, and it only seemed logical to tap the resources faith-based providers can offer.

To achieve this goal, S. 304 includes charitable choice provisions that require the Government to consider, on the same basis as other non-governmental organizations, faith-based organizations for providing the drug prevention and treatment assistance under the programs authorized by the bill. This provision is virtually identical to provisions in other Federal programs that are currently the law of the land.

Now, I know that at the time we introduced S. 304 Senator Leahy and others had some concerns and questions about the charitable choice provisions and wanted to explore the legal issues further. That is why we are here today. I continue to remain committed to working with my good friend to address any concerns within this very important bill. This hearing will enable us to examine some of the possible concerns and hopefully develop answers, where needed.

Charitable choice has its critics. Some have argued that it violates the Establishment Clause of the First Amendment, while others have argued that rampant discrimination would occur as a result of charitable choice. Still others complain that religious organizations will become dependent on the Federal Government and lose their religious independence if they vie for Government grants. There are all valid concerns, and we hope to air them out and address them with the help of our witnesses today.

I believe all of our witnesses here today would agree with me that we need to do more to ensure that everyone who is in need of a helping hand, whether that be drug treatment, a hot lunch, literacy tutoring, or spiritual guidance, can simply reach out and that hand will be there.

The bipartisan and, in the words of some, "revolutionary" S. 304 is a step in that direction. It offers promise to those who are addicted to drugs, who are some of our Nation's most destitute citizens. I am proud to say that since its introduction, numerous organizations, political officials, and concerned Americans have contacted the Committee to praise the bill.

At a press conference held prior to introducing the bill, prevention and treatment experts, standing beside law enforcement officials, regardless of party affiliation, spoke in unison about how the various prevention and treatment components of this bill will help to lower drug abuse in America.

S. 304 bespeaks our commitment to do more to prevent and treat substance abuse. Such efforts, it is safe to say, will prove worthwhile. Let me just emphasize, however, that while this legislation will prove enormously helpful, it is not a cure-all. Parents, grandparents, priests, pastors, rabbis, teachers, sports heroes, celebrities, and everyone else involved in a child's life needs to take an active role in educating our children about the dangers of drugs.

Drug abuse knows no boundaries. It doesn't discriminate on the basis of gender, race, age, or class. It is truly an equal opportunity destroyer, and unless children are given the knowledge and truth of how drugs will ruin their health and future, they are vulnerable to the lies of those who are peddling drugs. That is why it is so important that we enlist everyone, including faith-based groups, in the fight to save our children.

The fact is there is no simple answer to the problem of drug abuse. We all must step up our efforts to do everything we can to decrease the odds that our youth will fall prey to drug abuse and increase the odds that they will live healthy, productive lives.

All of our panelists who work with children understand the pivotal role responsible, caring adults can play in the lives of at-risk children. Allowing faith-based providers the opportunity to reach more of these children will result in less children falling prey to drugs and more children succeeding in life.

So I look forward to hearing our panelists' suggestions, based on their own experience and expertise, about what works, what doesn't, and what can be done. In particular, I am interested in listening to any suggestions that you may have for improving this legislation. That is important, as well.

I appreciate those who are here from Congress, and welcome both of you to the Committee today and welcome all of the other witnesses. This ought to be a very good hearing and we ought to learn a lot about what we should be doing in this area.

So thank you, Mr. Chairman. I appreciate it.

Chairman LEAHY. Well, I thank you.

We have Senator Santorum, of Pennsylvania, and Congressman Bobby Scott, of Virginia, here. I will start with Senator Santorum. I would indicate that I think the Senate goes in at 11:00. I am going to have to be on the floor at that time. I think we have a vote thereafter, but I would hope to keep the Committee going.

I would also note, as I said earlier, because people had asked what the schedules might be, I intend to begin nomination hearings for the judiciary certainly within a week or so of the time we are reorganized. I had the opportunity to conduct a large number of the hearings in President Reagan's last 2 years of office and a number of the hearings in the normal rotation of members during former President Bush's presidency.

I mention that because I read that a leading member of the Republic Party's leadership said that Senator Leahy has given no indication of being at all bipartisan. I would note that we have not had any hearings on judges yet this year. I intend to have them within two weeks of the time we organize. I would also note that of the ones I chaired before, I think I ended up voting for 98 or 99 percent of them. But for newer members of the Senate who might not have known my record, I would pass that on.

Senator Santorum, we are delighted to have you here.

STATEMENT OF HON. RICK SANTORUM, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SANTORUM. Thank you, Mr. Chairman. I am glad to hear those words.

Let me first congratulate you and Senator Hatch for introducing S. 304, and I would like to just sort of move into the two major areas of discussion of the President's initiative.

One is what I refer to as beneficiary choice; others term it charitable choice. I choose to call it beneficiary choice because what this provision does is actually gives beneficiaries the opportunity to choose between a secular program and a faith-based program. The requirements in the laws that have passed to date require that there is a secular alternative available as a prerequisite to having a faith-based alternative.

So there can never be a situation where someone is receiving Government funds or Government grants and it is a faith-based organization and they are the only one who is a recipient of Government grants for that particular purpose. So we understand that what we are talking about here is giving people the opportunity to choose between two different types of treatment with respect to government-funded programs.

I just want to bring you up to date on sort of where we are now. Right now, with the existing statutory authority, the White House can move forward in the area of discretionary grants to faith-based organizations where faith-based organizations are sort of in play and where they get involved in provision of services.

About 75 percent of the money that is available for the poor in discretionary grants is already covered by the previous legislation we passed. The biggest chunk of that is obviously TANF. What we are talking about expanding is actually a very small part of money relative to what is already in law that we can already act upon.

One is in the area of what you are addressing here today, which is in the area of juveniles and drug abuse and juvenile justice, and the other is in the area of housing and allowing faith-based organizations to be more involved in housing.

But what is happening and I think what has gone underreported is that the administration is already implementing charitable choice or beneficiary choice in a very aggressive way throughout the agencies. There are five agencies that now have directors in the agencies that are working, and they are working with Governors to promote charitable choice or beneficiary choice at the State level in a variety of programs that the State administers for the Federal Government.

The other thing that I wanted to stress in response to Senator Leahy's concerns is what problem are we trying to fix with beneficiary choice. That is a good question because, as Senator Leahy mentioned, there are lots of faith-based organizations that receive Government funds today. And he mentioned some of them, but what he mentioned, and I think it is really the case in point, are large, denominational churches that have access to Federal dollars, Catholic Charities being one, Lutheran Social Services another. But there are a variety of others that freely access Federal funds under conditions that they find acceptable.

The organizations that do not access these funds are smaller, most non-denominational, or small, denominational churches who do not have the infrastructure to go out and interact with the Government, with all the rules and regulations that are required under that.

So what we have ended up doing with previous charitable choice or just previous Government funding is in a sense discriminate against these small, non-denominational churches, primarily in the minority community, primarily in the African-American community and in the emerging Latino community. So a lot of these churches simply don't have the wherewithal or the network to be able to function in the area of communicating with the Government. What this provision tries to do is, in fact, create an opportunity for these organizations to reach in.

Now, one of the things that was asked was what do you think we can do to improve some of the concerns that people have with Government funds going to faith-based organizations or going to churches or synagogues or mosques. What are the concerns we have with the violation of the Establishment Clause? How can we deal with the concerns of Title VII, which is discrimination in hiring?

Well, a couple of things. First off, one suggestion I would make—and this is something that Senator Lieberman and I have been working on, and, as you know, he is the cosponsor of one of the bills I am going to talk about today and he has been a strong supporter of charitable choice in the past—is that we could require a new requirement that instead of funding any organization that goes out there and provides social services that we require churches to set up a separate 501(c)(3) as a way for them to receive funds.

Instead of funding directly churches, if there is a concern about direct funding of churches, and that is a concern particularly when it comes to some of the smaller churches that may be eligible—it is not concern for Catholic Charities because you don't fund the Catholic Church; you fund a separate 501(c)(3). We may have that as a requirement that may allay some of the fears of direct funding of churches, and it is something that certainly I would be amenable to as an additional provision of the charitable choice laws.

On the other concern about hiring, I would just suggest that there has been a blanket exemption for faith-based organizations to the civil rights requirement under Title VII. That has been upheld by the Supreme Court. To say this is unprecedented, I am not too sure is necessarily accurate. It is, in fact, the precedent of the Court that permits discrimination.

We are concerned, I understand, now that we are going to be giving Government dollars to faith-based organizations that may be discriminatory. We give Government dollars now to faith-based organizations that, quote, "may be discriminatory." We provide for all of these organizations a charitable deduction. So you can give tax dollars to these supposedly bigoted organizations, and so we support them right now with Government dollars.

As Senator Leahy has mentioned before, there are a lot of organizations now, faith-based in nature, that receive Government funds. There are a lot of faith-based hospitals that receive Government funds, schools and educational institutions that receive Government funds, all of whom now have exemptions from these hiring requirements.

Again, if we are focused on where this initiative is focused on, it is focused primarily on smaller, non-denominational churches or smaller denominational churches principally in poor, minority areas. To bring this up in this context, you know, I just question whether that is really a concern or whether this is sort of trying to grasp at straws to find a problem where one has really not existed in the past.

So I think there are adequate safeguards in place. This is something that we have been doing for quite some time, and I am hopeful that we can move forward to further expand it. Again, I am willing, as I think I mentioned today, to look at ways to provide some additional safeguards to make sure that we don't get into the situation that we are directly funding churches and church outreach and proselytization, which I don't think anybody has the intention of doing. We want to fund services. That is what the object of charitable choice is all about, is to provide services to people, not to promote particular religious organizations.

Finally, the second provision that is in the President's initiative which I think is vitally important is having to do with charitable giving. This has broad bipartisan support. We have introduced a bill, Senator Lieberman and I, that provides non-itemizers, people who do not fill out the long form, the ability to deduct charitable donations above $500. The reason we use $500 is because in the standard deduction on the short form, there is an assumption of $500 of charitable giving. So above $500 would be eligible, on the short form, to be able to deduct.

One of the concerns Senator Leahy with the death tax repeal is the reduction in charitable giving. This would be more than compensate for any potential reduction in the amount of charitable giving, to provide this incentive for people who do not fill out the long form. Seventy percent of filers fill out the short form. This would provide an incentive to do so. We also have provisions having to do with IRA rollovers.

Chairman LEAHY. Your point is that people will give charitable contributions that they don't have to itemize or have to establish that they gave in greater amounts than people who planning estates do in laying out specific items that are going to then be audited by the IRS? Now, that is faith-based. That is faith-based, I want to tell you right now. That is faith-based giving, faith that they will do it, but that is okay.

Senator SANTORUM. We all are subject to potential audit from our deductions that we take, but this is an opportunity for those who right now do not have the opportunity to get any tax benefits from charitable giving.

What I have found, at least, is that particularly in a lot of the churches that I go to in the inner city a lot of people there are very, very generous and give an enormous percentage of their income relative to most people to their churches and don't really get any tax benefit for doing so. I think this would encourage that and help that along.

There are a couple of other provisions that are mentioned in there. I don't want to take up any more of your time. You have been gracious with our time and I appreciate it.

Chairman LEAHY. Thank you, Senator.

Congressman Scott, you and I have discussed this whole thing at length before and I appreciate your coming over. I know that you have got all kinds of tugs on your time over on the House side. I also know that Senator Santorum does, too, so obviously either one of you feel free to go whenever you want.

Congressman Scott, thank you for coming over here and thank you for appearing before us.

STATEMENT OF HON. ROBERT C. SCOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Representative SCOTT. Thank you, Chairman Leahy, Ranking Member Hatch, and other members of the Committee. I am pleased to have the opportunity to appear before you to discuss my concerns regarding charitable choice.

Religiously affiliated organizations, as it has been mentioned—Catholic Charities, Lutheran Services, Jewish Federations, and a vast array of other organizations—now sponsor Government programs. Contrary to President Bush's assertions, I am unaware of anyone who opposes these organizations operating public programs and providing services.

They are funded like all other private organizations are funded. They are prohibited from using taxpayer money to advance their religious beliefs and they are subject to civil rights laws. Charitable choice, however, seeks to alter this longstanding relationship between church and state by allowing sponsors of federally-funded programs to advance their religious beliefs during the programs and by allowing religious discrimination in employment paid for with Federal dollars.

Now, just as an aside, for the smaller organizations, the smaller churches, there is no help in charitable choice for those organizations. They are going to have the same problems that any small neighborhood organization has, a civic organization. They don't have the board structure, they don't have the accounting. They are not going to be able to withstand an audit. They don't have grantwriters. Those same problems are going to occur for any small organization.

Charitable choice does two things. It allows proselytization during the program and it allows employment discrimination with Federal funds. Now, we can't intelligently discuss the pros and cons of charitable choice until we get a straight answer to one fundamental question, and that is are we funding the faith or not. In a recent commencement address the President said, "Government should never fund the teaching of faith, but it should support the good works of the faithful."

Furthermore, the legislation itself prohibits Federal funds from being used to pay for proselytization. But if the Government is, in fact, not funding the faith, then there is no need to discuss the preservation of the religious character of the sponsoring organization. There is no need for a separate secular service elsewhere. There is no need to provide for employment discrimination. In fact, there is no need for charitable choice. If the Government is not funding the faith, the organization can receive funds just as Catholic Charities does now without charitable choice.

Contrary to the President's assertions, this morning's Washington Post cites the founder of Habitat for Humanity saying that his organization is thriving under the present law. Unfortunately, the provisions in charitable choice guaranteeing the right to retain the religious character of the sponsor also guarantees that the program will promote religious views.

The prohibition against using Federal funds for proselytization does not prevent volunteers from taking advantage of the captured audience and converting the Federal program into a virtual worship service. Furthermore, many supporters of charitable choice acknowledge that the religious experience is exactly what is being funded.

At a forum a few months ago my friend, Senator Santorum, criticized me for not recognizing that with some drug rehabilitation programs religion is a methodology. At recent hearings, sponsors have explained that their programs are successful because of the religious nature of the program. So if the faith is being funded, we need to candidly express the Establishment Clause implications of having Government officials pick and choose between which religion will have its faith advanced during a government-funded program. So you have to answer the question, are you funding the faith or not. If not, you don't need charitable choice. And if so, address the Establishment Clause of the First Amendment.

There is another important policy question that has to be addressed, and that is should we allow employment discrimination in federally-funded programs. Now, the Ranking Member, Mr. Hatch, cited the Pew poll to show that people support faith-based funding.

That same poll said that 78 percent opposed discrimination in hiring, that same poll. Now, when you are talking Constitution, I think you get off base by citing polls, but if you are going to cite the poll, let's cite the whole thing. Seventy-eight percent opposed discrimination in employment.

Discrimination in employment is not unprecedented in America. There was a time when some Americans, because of their religion, were not considered qualified for certain jobs. In fact, before 1960 it was thought that a Catholic could not be elected President. Before the civil rights laws of the 1960's, people of certain religions routinely suffered invidious discrimination when they sought employment.

Sixty years ago this month, President Roosevelt established the principle in an executive order that you cannot discriminate in Government defense contracts on the basis of race, religion, color, or national origin. And the civil rights law of the 1960's outlawed schemes which allowed job applicants to be rejected solely because of their religious beliefs.

Some of us are frankly shocked that we would be even having a debate over whether sponsors of Federal programs can discriminate in hiring. But then we remember that the passage of the civil rights laws in the 1960's was not unanimous, and it is clear that we are now using charitable choice to re-debate the passage of basic anti-discrimination laws.

Mr. Chairman, I believe that publicly financed employment discrimination was wrong in the 1960's and it is still wrong. Some have suggested that organizations should be able to discriminate in employment to select employees who share their vision and philosophy. Under present law, you can discriminate on just about anything you want, but because of our sorry history of discrimination against certain Americans, we have had to establish protected classes. Under Title VII, you cannot discriminate against an individual based on race, sex, national origin, or religion.

The current exemption under Title VII for religious organizations is a common-sense exemption, but that exemption is intended to apply to the use of the funds of the religious organization. It was never expected to apply to the use of Federal funds.

In addition to the insulting prospect that otherwise qualified individuals might be denied employment solely because of their race, there are other civil rights implications in terms of gender and race that have to be considered.

Courts have read a constitutionally-based ministerial exception into Title VII that excludes some employment decisions by religious organizations from all provisions of Title VII, allowing discrimination on race, gender, and everything else. It is unclear how the ministerial exception would affect civil rights applicants under charitable choice. Other witnesses will discuss the shortcomings of Title VI in addressing that issue.

Some suggest charitable choice is no different from present law which allows religiously-affiliated hospitals and colleges to receive public funds and then discriminate in some of their high-level positions. The courts in those cases have distinguished cases involving indirect benefits, like a college student choosing where to go with his Pell grant, from a direct benefit where the Government provides a direct contract for services.

Now, if charitable choice were a voucher program where the drug addict would select the program he is going to participate in, rather than a grant program where the Government selects the program, the analysis might be different. But there is no question that there should be no discrimination in programs selected by the Government to provide those services.

Charitable choice therefore represents an historic reversal of decades of progress in civil rights enforcement. The President and supports of charitable choice have promised to invest resources in our inner cities, but it is insulting to suggest that we can't get those investments unless we turn the clock back on civil rights. Therefore, the faith-based initiative should not proceed without strong civil rights protections.

Mr. Chairman, there are other problems with it. You have mentioned licensing. That is one. There are other problems with the Establishment Clause and discrimination. I think those are the two major ones.

Let me just say one final thing. We have talked about the present laws that have been passed and enacted. The Committee ought to review the signing statements when President Clinton signed those bills. He stated, in signing, that he was signing them with the interpretation under the Establishment Clause which specifically rules unconstitutional most of what they are trying to do under charitable choice. It is interesting that there has been, under the Clinton administration, no funding of the pervasively sectarian organizations because that is a direct affront to the Establishment Clause.

I thank you for holding the hearing, Mr. Chairman and Mr. Hatch, and thank you for your courtesy in allowing me to participate.

Chairman LEAHY. Thank you very much.

Senator HATCH. Could I make one comment?

Chairman LEAHY. Of course.

Senator HATCH. Representative Scott, you mentioned in your testimony that the charitable choice legislation would permit religious groups to advance their religion during the provision of government-funded social services.

I would just like to clarify that the charitable choice legislation that we have drafted specifically prohibits religious organizations from using funds for, quote, "sectarian worship, instruction, or proselytization," unquote.

The law that exists today was enacted during Lyndon Johnson's tenure and does permit religious discrimination based upon valid religious reasons. Both the Democrat Senate and Democrat House of Representatives at the time passed that legislation.

I wanted to make it clear that our bill specifically prohibits religious organizations from using funds for worship or proselytization or particular indoctrination or anything like that.

Representative SCOTT. Well, Mr. Hatch, in my remarks I pointed out that although that prohibition is there, there is nothing to prohibit volunteers from coming over and capturing the program and converting it into a worship service.

Now, if it is the position that those words are to prohibit not only the Federal funds to be used for proselytization but also the program through volunteers or otherwise being converted into a religious program, then you don't need charitable choice.

I would also point out that the civil rights exception with Title VII was in the expectation that that would be church money that you would be using, not Federal money, in hiring. The church can hire whatever the church or religious organization wants, but with Federal funds I think, according to the poll that you cited, 78 percent of the people would oppose using Federal funds in a discriminatory fashion.

Senator HATCH. Well, I would also accept that with regard to personal religious beliefs. I mean, I think the civil rights law is basically pretty clear on that.

Representative SCOTT. Not with Federal money.

Senator SANTORUM. They didn't differentiate. You are projecting that they differentiated in the case and they did not do so in that case.

Senator HATCH. That is right.

Representative SCOTT. Well, they didn't differentiate because there was no expectation that you would ever fund pervasively sectarian organizations.

Senator SANTORUM. You are making an assumption of what the court is saying without any backing to say that.

Senator HATCH. Well, we are not doing that here.

Chairman LEAHY. Well, I think the Congressman raises a valid point. The Senator may disagree with it, but I think it is still one of the things this Committee is going to have to wrestle with and I think that is something both of you would agree on.

I am going to submit for the record a number of items. Of course, we will leave the record open for a week for submissions and questions.

If there are no questions of either of these members, I want to excuse them.

Senator BROWNBACK. Mr. Chairman?

Chairman LEAHY. Senator Brownback?

Senator BROWNBACK. I don't have any particular questions for these members, but because there is still some question about how we are organized, I would like to ask unanimous consent that my opening statement be included in the record, as I went on the Committee this term in Congress and I know there is a question about how things are organized now.

Senator BIDEN. You mean you want it in before you get knocked off the Committee?

Senator BROWNBACK. That is correct.

[Laughter.]

Chairman LEAHY. Sam, we want you on the Committee.

Let me do this just so there won't be any precedential thing, and I mentioned this before you came in. This hearing had been noticed by Senator Hatch earlier.

Senator HATCH. At your request.

Chairman LEAHY. He had wanted to have it at a different time and had to change it because of me. Obviously, with that and with the history of accommodation between the two of us, I went forward with the hearing.

Let's do it this way. By consent, anybody who was a member of the Committee last week, and I hope will be on it in the future, can feel free to submit statements and questions and participate in this.

Just so people will understand the precedent, we made an exception for this hearing, my courtesy to Senator Hatch and his courtesy to me earlier on the scheduling. Again, as I said, while we have not held judicial confirmation hearings yet this year, for a number of reasons, we will begin those within two weeks of the time of reorganization, and I would hope even less than two weeks, but I just don't know how the paperwork moves around. So this will probably be the only hearing we will do until that.

Obviously, the Senator has had probably as much an interest in this as anybody in the Senate and should have a right to get his questions in.

Gentlemen, thank you very much for being here. Well, could you hold just a moment? I am sorry.

Senator BIDEN. If I could just ask a few questions of our colleagues?

Chairman LEAHY. Yes, go ahead.

Senator BIDEN. Bobby, can you wait just for a second? I won't take much of your time.

Mr. Chairman, I would ask unanimous consent that my opening statement be placed in the record as if read.

Chairman LEAHY. Without objection.

Senator BIDEN. There is an old expression that was revived when Ronald Reagan was President, which is "if it ain't broke, don't fix it," and I am not sure that we are going to break something that is fixed here. I am not sure, I just simply don't know.

I would like you both to answer just two questions, and I am not going to talk about the Establishment Clause or the constitutional issues for the moment, but I acknowledge they are issues that have to be resolved.

When we are talking about, as you do, Senator Santorum, the need to get to much smaller faith-based organizations that don't have the infrastructure to compete for Government funding, can you tell me whether or not you are assuming that they will have to meet the same standards relative to competence, capability, et cetera, to be able to get the money?

Senator SANTORUM. They are going to have to compete for this funding like anybody else.

I was just in Pittsburgh earlier this week and we had something that we have never done in Pittsburgh all as a result of this discussion on the faith-based initiative, which is a bunch of the small, denominational churches got together with the Catholic Church and with other churches in the Pittsburgh community and they formed a consortium to take advantage of what they see now as a more receptive Government toward their institutions and their ministries in these small communities.

I talked to the bishop in Pittsburgh about this several months ago and encouraged him to move forward with this. The Catholic Church has a great—I mean, as far as technical assistance is concerned, they have been doing it for a long time; they know how to do it and they do it well. What they are going to do is provide some technical assistance to some of these churches which heretofore have not participated.

All of these churches are now willing to come forward because they see a less hostile Government toward what they do. Now, that doesn't necessarily mean that the Government won't say to them, well, we don't particularly want to fund what particularly you do, because there may be some things that the Government may not be willing to fund.

Senator Biden. Well, let me get to one place that I know a lot about substantively. There is a lot I don't know, as is obvious, but one of the things I do know a fair amount about just from doing it for so many years is the drug treatment area.

I know you are not a spokesman for the administration, but you are very involved in this. Based on your statement, which I thought was very clear explaining where we were now, can you tell me whether the administration definitely supports medical-based treatment for drug abuse; that it wouldn't support funding that did not meet basic medical standards?

Senator Santorum. I am not a spokesman for the administration on this and, as you know, we have an expansion already with, I guess, the bill that was signed in December that gets into drug and alcohol treatment.

I would suspect that the agency in charge, which I assume in this case would be the Department of Health and Human Services, would have certain criteria that organizations would have to be competent in to be eligible to receive those funds, and I don't believe they will waive those criteria for this program.

Senator Biden. Would you oppose language in legislation requiring that in these beneficial choice, as you call it, or charitable choice programs the personnel administering the program be licensed and certified under whatever the State or Federal law is?

Senator Santorum. I think those are things that we certainly can work on. Obviously, one of the concerns on any of these treatments is to make sure that we don't create so many limitations on these programs that they can't be effective.

But I would agree with this: there are certain things, there are certain base requirements—

Senator Biden. Basic threshold requirements.

Senator Santorum.—basic things that we should adhere to, and we shouldn't change them simply because it is a faith-based organization.

Senator Biden. Good. Again, let me give you just one example because I want to make sure I understand this. For example, let's assume there is a day care facility provided by a faith-based organization under the new legislation. I assume you would be arguing that in order to receive this funding, they would have to adhere to basic requirements—smoke detectors, emergency doors, all those basic things.

Senator Santorum. All the requirements that are going to be required of secular organizations should be similarly required of anybody competing for these funds.

Senator BIDEN. Lastly—and I appreciate the time—Congressman Scott, I thought quite frankly your constitutional analysis was right on the button in terms of the distinction between indirect and direct aid.

What I would like to ask you is if you could only pick one concern, what is the single most serious concern you have? It may be an unfair question because they may be of equal consequence to you.

Representative SCOTT. Part of the concern is—I think you started off with if it is not broke, don't fix it—what are we trying to fix. Why are you providing discrimination? I think that is the most offensive, and according to the poll that was cited—and I hate citing polls particularly when you are talking about the Constitution because it doesn't work in a constitutional analysis, but 78 percent don't agree with that.

Charitable choice doesn't help the small organization. They have still got to go and get the grant. They have got to write the grant. They are going to be audited. They have to perform. Small organizations have the same problems, and the technical assistance can be done under present law. The outreach, the attitude, that can be done under present law. What charitable choice does is you can proselytize during the program. You can have a religious message and you can discriminate based on religion.

Senator BIDEN. Is it only on religion? That is not insignificant, but is it only an ability to discriminate based on religion?

Representative SCOTT. My view is that the ministerial exception probably allows racial discrimination, too. There will be others who will speak to that. Furthermore, I have never seen a church sued for racial discrimination in hiring. In one State, maybe once a year you might, but with all of the hiring decisions made by all of the churches, the suggestion that there is no discrimination out there is ridiculous.

Senator BIDEN. Can Catholic Charities now, which sets up a 501(c)(3) in order to be able to receive Government funding—if either of you would answer this question, can they say that no one can work for Catholic Charities who is not a Roman Catholic? Are they able to say that now?

Senator SANTORUM. They don't say that.

Senator BIDEN. I know they don't say that. I am just trying to ask the question. Well, let's say a 501(c)(3) program set up by the Lutheran Church for housing. In my State, the Lutheran Church has done more to provide housing for the elderly than any organization in my State.

Legally, as it stands now, can they say that you cannot work the Lutheran 501(c)(3) program unless you are a Lutheran? They can say that about their church.

Representative SCOTT. There are some positions possibly in Catholic Charities that you have to be Catholic, but those will not be paid for with Federal money.

Senator SANTORUM. It is hard for me to answer that question because I don't know of any organization that makes that claim. What many will say is that people have to believe in certain things or have to have a certain approach that is consistent with their approach, but that is no different than any other organization.

Senator BIDEN. With 12 years of Catholic education, I understand it. As a practicing Catholic, I understand it. As a guy who carries my rosary beads, I understand it. I have got that part; I understand it. I am not asking whether Catholics discriminate. I want to know, can we?

Representative SCOTT. I don't know of any real estate agency that says they discriminate in renting, but if you send testers out there, the white will get the apartment and the black won't.

Senator BIDEN. I guess what I am trying to get at is there any distinction between the existing method by which religious-based organizations set up programs to aid and assist in the social service area, whether it is housing or drug rehab or whatever it happens to be—now, they are required to have a 501(c)(3) to do it and get Federal money.

Is there any distinction between what the law requires now and what would be required if this legislation passed?

Senator SANTORUM. No, there is no change.

Representative SCOTT. Yes, there is a change.

Senator SANTORUM. There is no change.

Senator BIDEN. I want you to tell me why.

Senator SANTORUM. There is nothing in any of these statutes that changes the Civil Rights Act. There is nothing in there.

Representative SCOTT. Then we don't need charitable choice if there is no change.

Senator SANTORUM. But those are not amendments to the Civil Rights Act.

Representative SCOTT. Well, then you say there is a change. If there is no change, you don't need charitable choice. I am suggesting that there is a change, and the change is that the religious organization can take the Federal money and hire somebody with the Federal money and discriminate on the basis of religion, and possibly race, too, but certainly in the words of the legislation they can discriminate—

Senator SANTORUM. With all due respect, that is not a question of hiring. That is a question of uses of Government funds, but it is not a question of Title VII. The issue of Title VII and hiring has nothing to do with what the organization uses the money for. It is whether they can hire or not.

Senator BIDEN. Well, my time is up, and I made a wise decision in not deciding to chair this Committee. So I yield to the Senator from New York, who is temporarily chairing it, and I am getting the heck out of here and go pray on this.

Senator SCHUMER. [presiding]. Well, thank you, and we are going to take a 15-minute break because of the interregnum passing of the baton on the floor which we want to be part of.

I guess you are the Ranking Member as of 11:00.

The Ranking Member wanted to make a brief statement and we will do that.

Senator HATCH. Well, I just wanted to state for the record that at the request of Senator Biden, S. 304 requires that, quote, "Any program carried out with funds authorized under this Act shall be based on a program shown to be efficacious, and shall incorporate research-based principles of effective substance abuse treatment," unquote. I just want to make that matter clear.

Senator Specter. Mr. Chairman, before we break, may I ask one question?

Senator Schumer. Well, we really have to be on the floor.

Senator Specter. Well, let me just make a very brief statement without articulating a question.

Senator Schumer. The Senator from Pennsylvania is recognized.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator Specter. I commend Senator Santorum and Congressman Scott for their work here today. There may not be time for a response, but the concern that I have is the one on proselytizing. There are many complex issues on separation of church and state, and there isn't time for a response now.

I just want to welcome former mayor Wilson Goode, from Philadelphia, who is here on panel three. This hearing has been set on about the toughest day of the year, if not the 20 years that I have been here.

Thank you very much.

Senator Schumer. I thank you.

Representative Scott. Mr. Chairman, I can respond in a second.

Senator Schumer. I would ask that the record be laid open for written responses for both the Senator from Pennsylvania and my good friend from Virginia.

With that, we will resume at 11:20.

[The Committee stood in recess from 11:03 a.m. to 11:41 a.m.]

Senator Schumer. The hearing will come to order. I apologize to everybody. As you know, Senator Byrd was sworn in as President pro tem and that made Senator Daschle Majority Leader, and I thought that Senators should have the opportunity to be there to witness something that is historic and unique in American history, the passing of the baton in a peaceful way. So I apologize to everybody who had to wait.

Our next witness is Mr. Carl H. Esbeck. Mr. Esbeck is senior counsel to the Deputy Attorney General at the Department of Justice. He works in cooperation with the Office of Faith-Based and Community Initiatives at the White House.

Mr. Esbeck, we appreciate your taking the time to be here. You have 5 minutes and the rest of your statement will be put in the record.

STATEMENT OF CARL H. ESBECK, SENIOR COUNSEL TO THE DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. Esbeck. Thank you, Chairman Schumer.

I believe that we do have common ground in several respects. First, as we get into the legal issues, and indeed they are important, it is easy to forget that ultimately this is about people, and, of course, people who are poor and people who are needy, in particular with chemical addictions.

Faith-based groups are uniquely positioned to reach these hard-to-reach individuals for two reasons, I think. They have high access and high credibility. By high access I mean they are in these neighborhoods, they know these people. These are the people they run into at the grocery stores and at the corner gas stations. But also they have high credibility with these people. They trust them, they know these leaders. They have had experience with them. Charitable choice provides options. It would be foolish not to take advantage of these specially-situated faith-based organizations.

Second, everyone here wants faith-based organizations to retain their full religious character. Neither side wants to give them funding beyond their means without adequate technical assistance, and no one wants to silence what they call their prophetic voice, which is to say when they speak out and criticize Government. And no one wants them to become dependent on Government funding and thereby lose their religious moorings.

That is why a good deal of the text of charitable choice is spent surrounding these organizations with autonomy protections. If they retain that autonomy or freedom, then they will be free to continue to do their good work.

The third area of common ground: No one here wants to force religion upon those who are receiving services, and the drafters of the bill take care of that.

Fourth, there is continued, maybe growing interest in indirect forms of aid. That is sort of like the funding that we had through a GI bill. The interest, of course, is because there are then less constitutional restrictions on faith-based organizations. This ought to be pursued.

And fifth, and last, no one wants to harm that venerable American tradition, separation of church and state. But the choice here is not between church and state and something else. Instead, the debate is over what do you mean by separation.

What charitable choice does is it shifts the focus. No longer is the focus on the organization and you ask, well, who are you, or how intensely religious are you. Instead, the question is what can you do; how can you restructure who you are so that you can operate within the statutory and constitutional parameters. If you are willing to do that, then you compete for funding the same as anyone else.

Now, what does a program have to do in order to comport with the latest U.S. Supreme Court cases? First, there can be no Government aid diverted to sectarian activity. Second, no one receiving welfare benefits can be compelled to participate in sectarian activities.

Charitable choice is not for every faith-based organization. No one has ever claimed otherwise. But for those faith-based organizations who are willing and able to follow the rules, charitable choice provides another very valuable option for raising Americans out of poverty.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Esbeck follows:]

STATEMENT OF CARL H. ESBECK, SENIOR COUNSEL TO THE DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

INTRODUCTION

By letter of May 24, 2001, the Senate Judiciary Committee invited the views of the U.S. Department of Justice concerning statutory and constitutional issues raised by § 701 (charitable choice) of S. [illegible]04, The Drug Abuse Education, Prevention, and

Treatment Act of 2001. Thank you for the invitation. This document is the Department's response to the Committee's letter.

Charitable choice is already part of three federal social service programs. The provision first appeared in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),[1] two years later it was incorporated into the Community Services Block Grant Act of 1998,[2] and last year it was made part of the reauthorization of funding for the Substance Abuse and Mental Health Services Administration (SAMHSA).[3] Each of these programs has the overarching goal of helping those in poverty or treating those suffering from chemical dependency, and the programs seek to achieve their purpose by providing resources in the most effective and efficient means available. The object of charitable choice, then, is not to support or sponsor religion or the participating religious providers. Rather, the goal is secular, namely, to secure assistance for the poor and individuals with needs, and to do so by leveling the playing field for providers of these services who are faith-based.

Charitable choice is often portrayed as a source of new federal financial assistance made available to-indeed earmarked for-religious charities. It is not. Rather, charitable choice is a set of grant rules altering the terms by which federal funds are disbursed under existing programs of aid. As such, charitable choice interweaves three fundamental principles, and each principle receives prominence in the legislation.

First, charitable choice imposes on both government and participating FBOs the duty to not abridge certain enumerated rights of the ultimate beneficiaries of these welfare programs. The statute rightly protects these individuals from religious discrimination by FBOs, as well as from compulsion to engage in sectarian practices against their will.

Second, the statute imposes on government the duty to not intrude into the institutional autonomy of faith-based providers. Charitable choice extends a guarantee to each participating faith-based organization [FBO] that, notwithstanding the receipt of federal grant monies, the organization "shall retain its independence from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs."[4] In addition to this broadly worded safeguard, there are more focused prohibitions on specific types of governmental interference such as demands to strip religious symbols from the walls of FBOs and directives to remake the governing boards of these providers.[5] A private right of action gives ready means of enforcement to these protections of institutional autonomy.[6]

Third, the statute reinforces the government's duty to not discriminate with respect to religion when determining the eligibility of private-sector providers to deliver social services.[7] In the past, an organization's "religiosity," obviously a matter of degree not reducible to brightlines, was said to disqualify providers found to be "pervasively sectarian." That inquiry was always fraught with difficulties. Now, rather than probing into whether a service provider is thought to be "too religious" as opposed to "secular enough," charitable choice focuses on the nature of the desired services and the means by which they are to be provided. Accordingly, the relevant question is no longer "Who are you?" but "What can you do?" So long as a provider is prepared to operate in line with all statutory and constitutional parameters, then an organization's degree of "religiosity" is no longer relevant.

Because they are a useful way of framing the most pertinent statutory and constitutional questions, we expand on these three principles below. Moreover, as will be discussed, the Department of Justice recommends certain amendments to § 701 of S. 304.

I. THE RIGHTS OF BENEFICIARIES

In programs subject to charitable choice, when funding goes directly to a social service provider the ultimate beneficiaries are empowered with a choice.[8] Beneficiaries who want to receive services from an FBO may do so, assuming, of course, that at least one FBO has received funding.[9] On the other hand, if a beneficiary has a religious objection to receiving services at an FBO, then the government is required to provide an equivalent alternative.[10]

This is the "choice" in charitable choice. Moreover, some beneficiaries, for any number of reasons, will inevitably think their needs better met by an FBO. This possibility of choosing to receive their services at an FBO is as important a matter as is the right not to be assigned to a religious provider. There is much concern voiced by civil libertarians about the latter choice, whereas the former is often overlooked. Supporters of charitable choice regard both of these choices—to avoid an FBO or to seek one out—as important.

If a beneficiary selects an FBO, the provider cannot discriminate against the beneficiary on account of religion or a religious belief.[11] Moreover, the text's explicit protection of "a refusal to actively participate in a religious practice" insures a beneficiary's right to avoid any unwanted sectarian practices.[12] Hence, participation, if any, is voluntary or noncompulsory. When direct funding is involved, one recent court decision suggested that this "opt-out" right is required by the first amendment.[13] Beneficiaries are required to be informed of their rights.[14]

The Department of Justice recommends that § 701 of S. 304 be strengthened by amending subsection (h) along the lines indicated in the note below.[15] This proposal has a clearer statement of the voluntariness requirement. The provision on separating the government-funded program from sectarian practices is discussed in Part III, below. The suggested Certificate of Compliance has the purpose of impressing upon both the government/grantor and the FBO the importance of both voluntariness and the need to separate sectarian practices.

II. THE AUTONOMY OF FAITH-BASED PROVIDERS

Care must be taken that government funding not cause the religious autonomy of FBOs to be undermined. Likewise, care must be taken that the availability of government funding not cause FBOs to fall under the sway of government or silence their prophetic voice. Accordingly, charitable choice was drafted to vigorously safeguard the "religious character" of FBOs, explicitly reserving to these organizations "control over the definition, development, practice, and expression" of religious belief.[16] Additionally, congressional protection for the institutional autonomy of FBOs was secured so as to leave them free to succeed at what they do well, namely reaching under-served communities. Finally, protecting institutional autonomy was thought necessary to draw reluctant FBOs into participating in government programs, something many FBOs are unlikely to do if they face invasive or compromising controls.

One of the most important guarantees of institutional autonomy is an FBO's ability to select its own staff in a manner that takes into account its faith. Many FBOs believe that they cannot maintain their religious vision over a sustained time period without the ability to replenish their staff with individuals who share the tenets and doctrines of the association. The guarantee is central to each organization's freedom to define its own mission according to the dictates of its faith. It was for this reason that Congress wrote an exemption from religious discrimination by religious employers into Title VII of the Civil Rights Act of 1964. And charitable choice specifically provides that FBOs retain this limited exemption from federal employment nondiscrimination laws.[17] While it is essential that FBOs be permitted to make employment decisions based on religious considerations, FBOs must, along with secular providers, follow federal civil rights laws prohibiting discrimination on the bases of race, color, national origin, gender, age, and disability.[18]

Opponents of charitable choice have charged that it permits a form of" government-funded job discrimination." We do not believe this is the case for the following reasons. First, there is a certain illogic to the claim that charitable choice is "funding job discrimination." The purpose of charitable choice, and the underlying federal programs, is not the creation or funding of jobs. Rather, the purpose is to fund social services. The FBO's employment decisions are wholly private. Because the government is not involved with an FBO's internal staffing decisions, there is no causal link between the government's singular and very public act of funding and an FBO's numerous and very private acts related to its staffing. Importantly, these internal employment decisions are manifestly not "state or governmental action" for purposes of the Fifth and Fourteenth Amendments.[19] Hence, because the Constitution restrains only "governmental action," these private acts of religious staffing cannot be said to run afoul of constitutional norms.[20]

Second, critics of charitable choice are wrong when they claim to have detected a contradiction. Why, they ask, is it important to staff on a religious basis when the FBOs cannot engage in religious indoctrination within a government-funded program? Since there can be no such indoctrination, they go on, what possible difference could it make that employees share the FBO's faith? There is no contradiction, however, once this line of argumentation is seen as failing to account for the FBO's perspective. From the government's perspective, to feed the hungry or house the destitute is secular work. But from the perspective of the FBO, to operate a soup kitchen or open a shelter for the homeless are acts of mercy and thus spiritual service. In his concurring opinion in *Corporation of the Presiding Bishop* v. *Amos*, Justice William Brennan, remembered as one of the Court's foremost civil libertarians, saw this immediately when he wrote that what government characterizes as social services, religious organizations view as the fulfillment of religious duty, as service in grateful response to unmerited favor, as good works that give definition and focus to the community of faithful, or as a visible witness and example to the larger society.[21] All of which is to observe that even when not engaged in religious indoctrination" such as proselytizing or worship, FBOs view what they are doing as religiously motivated and thus may desire that such acts of mercy and love be performed by those of like-minded creed.[22]

Third, it is not always appreciated that private acts of religious staffing are not motivated by prejudice or malice. In no way is religious staffing by FBOs comparable to the invidious stereotyping, even outright malice, widely associated with racial and ethnic discrimination. Rather, the FBO is acting-and understandably so-in accord with the dictates of its sincerely held religious convictions. Justice William Brennan, once again, was quick to recognize the importance of such civil rights exemptions to the autonomy of faith-based organizations:

> Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.[23]

Which is to say, not all discrimination is malevolent.[24] A religious organization favoring the employment of those of like-minded faith is comparable to an environmental organization staffing only with employees devoted to preserving the environment, a feminist organization hiring only those devoted to the cause of expanded opportunities for women, or a teacher's union hiring only those opposed to school vouchers. To bar a religious organization from hiring on a religious basis is to assail the very animating cause for which the organization was formed in the first place. If these FBOs cannot operate in accord with their own sense of self-understanding and mission, then many will decline to compete for charitable choice funding. If that happens, the loss will be borne most acutely by the poor and needy.

Fourth, in a very real sense Congress already made a decision to protect religious staffing by FBOs back in 1964, and then to expand on its scope in 1972.[25] Section 702(a) of Title VII of the Civil Rights Act of 1964[26] exempts religious organizations from Title VII liability for employment decisions based on religion.[27] Opponents claim that the § 702(a) exemption is waived when an FBO becomes a federally funded provider of social services. The law is to the contrary. Waiver of rights is disfavored in the law, and, as would be expected, the case law holds that the § 702(a) exemption is not forfeited when an FBO becomes a provider of publicly funded services.[28] Indeed, charitable choice expressly states that the § 702(a) exemption is preserved.[29] In light of the fact that the statutory language makes clear to FBOs that they will not be "impair[ed]" in their "religious character" if they participate in charitable choice, it is wholly contradictory to then suggest that FBOs have impliedly waived this valuable autonomy right.

Charitable choice affirmatively enables and requires government to stop "picking and choosing" between groups on the basis of religion. No longer can there be wholesale elimination of able and willing providers found by regulators or civil magistrates to be "too religious," a constitutionally intrusive and analytically problematic determination.[30] With charitable choice, religion is irrelevant during the grant awarding process. Nor does the government, in making awards, need to sort out those groups thought "genuinely" religious from those deemed pseudo-religious. This means that, contrary to the critics' fears, charitable choice leads to less, rather than more, regulation of religion.

Additionally, welfare beneficiaries have greater choice when selecting their service provider. For those beneficiaries who, out of spiritual interests or otherwise, believe they will be better served by an FBO, such choices will now be available in greater number. Expanding the variety of choices available to needy individuals in turn reduces the government's influence over how those individual choices are made.

III. THE NEUTRALITY PRINCIPLE

When discussing Establishment Clause restraints on a government's program of aid, a rule of equal-treatment or nondiscrimination among providers, be they secular or religious, is termed "neutrality" or the "neutrality principle." Charitable choice is consistent with neutrality, but courts need not wholly embrace the neutrality principle to sustain the constitutionality of charitable choice.

The U.S. Supreme Court distinguishes, as a threshold matter, between direct and indirect aid.[31] For any given program, charitable choice allows, at the government's option, for direct or indirect forms of funding, or both. Indirect aid is where the ultimate beneficiary is given a coupon, or other means of free agency, such that he or she has the power to select from among qualified providers at which the coupon may be "redeemed" and the services rendered. In a series of cases, and in more recent commentary contrasting indirect aid with direct-aid cases, the Supreme Court has consistently upheld the constitutionality of mechanisms providing for indirect means of aid distributed without regard to religion.[32] The Child Care and Development Block Grant Program of 1990,[33] for example, has been providing low income parents indirect aid for child care via "certificates" redeemable at, *inter alia*, churches and other FBOs. The act has never been so much as even challenged in the courts as unconstitutional.

In the context of direct aid, the Supreme Court decision that has most recently addressed the neutrality principle is *Mitchell* v. *Helms*.[34] The four-Justice plurality, written by Justice Thomas, and joined by the Chief Justice, and Justices Scalia and Kennedy, embraced, without reservation, the neutrality principle. In the sense of positive law, however, Justice O'Connor's opinion concurring in the judgment is controlling in the lower courts and on legislative bodies.[35]

Before proceeding in greater detail, the controlling principle coming from *Mitchell* v. *Helms* can be briefly stated: A government program of aid that directly assists the delivery of social services at a faith-based provider, one selected by the government without regard to religion, is constitutional, but real and meaningful controls must be built into the program so that the aid is not diverted and spent on religious indoctrination.[36]

Based on Justice O'Connor's opinion, when combined with the four Justices comprising the plurality, it can be said that: (1) neutral, indirect aid to a religious organization does not violate the Establishment Clause;[37] and (2) neutral, direct aid to a religious organization does not, without more, violate the Establishment Clause.[38] Having indicated that program neutrality is an important but not sufficient factor in determining the constitutionality of direct aid, Justice O'Connor went on to say that: (a) *Meek* v. *Pittenger*[39] and *Wolman* v. *Walter*[40] should be overruled; (b) the Court should do away with all presumptions of unconstitutionality; (c) proof of actual diversion of government aid to religious indoctrination would be violative of the Establishment Clause; and (d) while adequate safeguards to prevent diversion are called for, an intrusive and pervasive governmental monitoring of FBOs is not required.

The federal program in Mitchell entailed aid to K–12 schools, public and private, secular and religious, allocated on a per-student basis. The same principles apply, presumably, to social service and health care programs, albeit, historically the Court has scrutinized far more closely direct aid to K–12 schools compared to social welfare and health care programs.[41]

In cases involving programs of direct aid to K–12 schools, Justice O'Connor started by announcing that she will follow the analysis first used in *Agostini* v. *Felton*.[42] She began with the two-prong Lemon test as modified in Agostini: is there a secular purpose and is the primary effect to advance religion? Plaintiffs did not contend that the program failed to have a secular purpose, thus she moved on to the second part of the Lemon/Agostini test.[43] Drawing on *Agostini*, Justice O'Connor noted that the primary-effect prong is guided by three criteria. The first two inquiries are whether the government aid is actually diverted to the indoctrination of religion and whether the program of aid is neutral with respect to religion. The third criterion is whether the program creates excessive administrative entanglement,[44] now clearly downgraded to just one more factor to weigh under the primary-effect prong.[45]

After outlining for the reader the Court's LemonlAgostini approach, Justice O'Connor then inquired into whether the aid was actually diverted, in a manner attributable to the government, and whether program eligibility was religion neutral. Because the federal K–12 educational program under review in Mitchell was facially neutral, and administered evenhandedly, as to religion,[46] she spent most of her analysis on the remaining factor, namely, diversion of grant assistance to religious indoctrination. Justice O'Connor noted that the educational aid in question was, by the terms of the statute, required to supplement rather than to supplant monies received from other sources,[47] that the nature of the aid was such that it could not reach the "coffers" of places for religious inculcation, and that the use of the aid was statutorily restricted to "secular, neutral, and nonideological" purposes.[48] Concerning the form of the assistance, she noted that the aid consisted of educational materials and equipment rather than cash, and that the materials were on loan to the religious schools.[49]

Justice O'Connor proceeded to reject a rule of unconstitutionality where the character of the aid is merely capable of diversion to religious indoctrination, hence overruling Meek and Wolman.[50] As the Court did in Agostini, Justice O'Connor rejected employing presumptions of unconstitutionality and indicated that henceforth she will require proof that the government aid was actually diverted to indoctrination.[51]

Because the "pervasively sectarian" test is such a presumption, indeed, an irrebutable presumption (i.e., any direct aid to a highly religious organization is deemed to advance sectarian objectives),[52] Justice O'Connor is best understood to have rendered the "pervasively sectarian" test no longer relevant when assessing neutral programs of aid.[53]

Justice O'Connor requires that no government funds be diverted to "religious indoctrination," thus religious organizations receiving direct funding will have to separate their social service program from their sectarian practices.[54] If the federal assistance is utilized for educational functions without attendant sectarian activities, then there is no problem. If the aid flows into the entirety of an educational program and some "religious indoctrination [is] taking place therein," then the indoctrination "would be directly attributable to the government."[55] Hence, if any part of an FBO's activities involve "religious indoctrination," such activities must be set apart from the government-funded program and, hence, are privately funded.

A welfare-to-work program operated by a church in Philadelphia illustrates how this can be done successfully. Teachers in the program conduct readiness-to-work classes in the church basement weekdays pursuant to a government grant. During an hour break for free-time the pastor of the church holds a voluntary Bible study in her office up on the ground floor. The sectarian instruction is privately funded and separated in both time and location from the welfare to work classes.

In the final part of her opinion, Justice O'Connor explained why safeguards in the federal educational program at issue in Mitchell reassured her that the program, as applied, was not violative of the Establishment Clause. A neutral program of aid need not be failsafe, nor does every program require pervasive monitoring.[56] The statute limited aid to "secular, neutral, and nonideological" assistance and expressly prohibited use of the aid for "religious worship or instruction."[57] State educational authorities required religious schools to sign Assurances of Compliance with the above-quoted spending prohibitions being express terms in the grant agreement.[58] The state conducted monitoring visits, albeit infrequently, and did a random review of government-purchased library books for their sectarian content.[59] There was also monitoring of religious schools by local public school districts, including a review of project proposals submitted by the religious schools and annual program-review visits to each recipient school.[60] The monitoring did catch instances of actual diversion, albeit not a substantial number, and Justice O'Connor was encouraged that when problems were detected they were timely corrected.[61]

Justice O'Connor said that various diversion-prevention factors such as supplement/not-supplant, aid not reaching religious coffers, and the aid being in-kind rather than monetary are not talismanic. She made a point not to elevate them to the level of constitutional requirements.[62] Rather, effectiveness of these diversionprevention factors, and other devices doing this preventative task, are to be sifted and weighed given the overall context of, and experience with, the government's program.[63]

Charitable choice is responsive to the LemonlAgostini test and Justice O'Connor's opinion in *Mitchell* v. *Helms*:

1. The legislation gives rise to neutral programs of aid and expressly prohibits diversion of the aid to "sectarian worship, instruction, or proselytization." Thus, sectarian aspects of an FBO's activities would have to be segmented off and, if continued, privately funded. An amendment recommended by the Department of Justice is set out in the note below.[64] Under this proposal, direct monetary funding is allowed where an FBO, by structure and operation, will not permit diversion of government funds to religious indoctrination.[65] Some FBOs, of course, will be unable or unwilling to separate their program in the required fashion. Charitable choice is not for such providers. Those FBOs who do not qualify for direct funding should be considered candidates for indirect means of aid.
2. Participation by beneficiaries is voluntary or noncompulsory. A beneficiary assigned to an FBO has a right to demand an alternative provider. Having elected to receive services at an FBO, a beneficiary has the additional right to "refuse to participate in a religious practice." See discussion in Part 1, above.
3. Government-source funds are kept in accounts separate from an FBO's private-source funds, and the government may audit, at any time, those accounts that receive government funds.[66] Thus, charitable choice does take special care, because the aid is in the form of monetary grants, in two ways: separate accounts for government funds are established, hence, preventing the diversion of "cash to church coffers;[67] and direct monetary grants are restricted to program services, hence, must not be diverted to sectarian practices.[68]
4. For larger grantees, the government requires regular audits by a certified public accountant. The results are to be submitted to the government, along with a plan of correction if any variances that are uncovered.[69]

Nothing in charitable choice prevents officials from implementing reasonable and prudent procurement regulations, such as requiring providers to sign a Certification of Compliance promising attention to essential statutory duties.[70] Additionally, it is not uncommon for program policies to require of providers periodic compliance self-audits. Any discrepancies uncovered in a self-audit must be promptly reported to the government along with a plan to timely correct any deficiencies.[71] The Department of Justice believes it prudent to add these additional provisions to § 701 of S. 304.

CONCLUSION

Charitable choice facially satisfies the constitutional parameters of the LemonlAgostini test, including Justice O'Connor's application of that test in *Mitchell* v. *Helms*. Adoption of the Department of Justice's recommendations in notes 15, 17, 64, and 71, above, will further clarify and strengthen § 701's provisions, as well as ease its scrutiny in the courts. Moreover, for many cooperating FBOs, those willing to properly structure their programs and be diligent with their operating practices, it appears that charitable choice can be applied in accord with the applicable statutory and constitutional parameters.

END NOTES

[1] 42 U.S.C. § 604a (Supp. 1996). Charitable choice appeared as § 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2161 (1996). Section 604a applies to two federal revenue streams: Temporary Assistance to Needy Families and Welfare to Work monies. Welfare to Work funds were made subject to PRWORA in the 1997 Balanced Budget Act.

[2] 42 U.S.C. § 9920 (Supp. 1998). Charitable choice appeared as § 679 of the Community Services Block Grant Act, which was Title II of the Coats' Human Services Reauthorization Act of 1998, Pub. L. No. 105-285, 112 Stat. 2702, 2749 (Oct. 27, 1998).

[3] 42 U.S.C. § 300x-65 (Supp. 2000). SAMHSA concerns expenditures for substance abuse treatment and prevention under Titles V and XIX of the Public Health Services Act. The charitable choice provision pertaining to SAMHSA, signed by President Clinton on October 17, 2000, appeared as Title XXXIII, § 3305 of the Children's Health Act of 2000, Pub. L. No. 106-310, 114 Stat. 1212 (2000).

SAMHSA substance abuse treatment and prevention expenditures were again made subject to a charitable choice provision in the Community Renewal Tax Relief Act of 2000, signed by President Clinton on December 21, 2000. *See* 42 U.S.C. § 290kk (Supp. 2000). This Act was incorporated by reference in the Consolidated Appropriation Act of 2001, Pub. L. No. 106-554.

[4] 42 U.S.C. § 604a(d)(1). The parallel subsection in S. 304 is § 701(b)(1).

[5] 42 U.S.C. § 604a(d)(2). The parallel subsection in S. 304 is § 701(b)(2).

[6] 42 U.S.C. § 604a(i). The parallel subsection in S. 304 is § 701(g).

[7] 42 U.S.C. § 604a(b) and (c). The parallel subsection in S. 304 is § 701(a).

[8] Charitable choice contemplates both direct and indirect forms of aid. 42 U.S.C. § 604a(a)(1). This is most apparent in S. 304 by comparing the subparts of § 701(e). If the means of funding is indirect, as with, for example, federal child-care certificates, then choice is intrinsic to the beneficiary's selection of a child care center at which to "spend" his or her certificate.

[9] It may be that on some occasions no FBOs successfully compete for a grant or cooperative agreement. This is to be expected. Charitable choice is not a guarantee that resources will flow to FBOs. Rather, charitable choice guarantees only that FBOs will not be discriminated against with respect to religion.

[10] 42 U.S.C. § 604a(e)(1). The parallel subsection in S. 304 is § 701(d)(1). The alternative may be another provider not objectionable to the beneficiary, or the government may find it more cost efficient to purchase the needed services on the open market.

BEST COPY AVAILABLE

[11] 42 U.S.C. § 604a(g) (FBOs may not discriminate against beneficiaries "on the basis of religion [or] a religious belief"). The parallel subsection in S. 304 is § 701(e)(1).

[12] 42 U.S.C. § 604a(g) (FBOs may not discriminate or otherwise turn away a beneficiary from the organization's program because the beneficiary "refus[es] to actively participate in a religious practice"). Thus, a beneficiary cannot be forced into participating in sectarian activity. Moreover, by virtue of § 604a(j), any such sectarian practices must be privately funded in their entirety and, hence, conducted separate from the government-funded program. *See* Part III, below, discussing the need to separate sectarian practices from the government-funded program.

[13] *See* DeStefano v. Emergency Housing Group, Inc., 2001 WL 399241 * 10-12 (2d Cir. Apr. 20, 2001) (dictum expressing belief that it would be violative of Establishment Clause should beneficiaries of state-funded alcohol treatment program be compelled to attend Alcoholics Anonymous sessions, such sessions being deemed religious indoctrination).

[14] The "actual notice" requirement first appeared in the SAMHSA reauthorization. *See* 42 U.S.C. § 300x-65(e)(2). The parallel subsection in S. 304 is § 701(d)(2). Of course, nothing in prior versions of charitable choice prevents the government/grantor from ensuring actual notice of rights to beneficiaries. Moreover, while it may be prudent for the grantor to provide notice of rights whether required by the underlying legislation or not, the absence of a requirement in older versions of the law hardly rises to the level of a constitutional concern.

[15]

> (h) LIMITATIONS ON USE OF FUNDS ~~FOR CERTAIN PURPOSES~~; VOLUNTARINESS.– No funds provided through a grant or cooperative agreement ~~contract~~ to a religious organization to provide assistance pursuant to ~~under~~ any program funded under this Act ~~described in subsection (e)~~ shall be expended for sectarian instruction, worship, ~~instruction;~~ or proselytization. If the religious organization offers such an activity, it shall be voluntary for the individuals receiving services and offered separate from the program funded under this Act. A certificate shall be separately signed by religious organizations, and filed with the government agency that disbursed the funds, certifying that the organization is aware of and will comply with this subsection. Failure to comply with the terms of the certification may, in addition to other sanctions as provided by law, result in the withholding of the funds and the suspension or termination of the agreement.

[16] Religious organizations often serve a useful role as moral critics of culture and, in particular, the actions of government. The mention of "control over . . . expression" in 42 U.S.C. § 604a(d)(1), prohibits government from using the threat of denial of a grant, or withholding monies due under an existing grant, as a means of "chilling" the prophetic voice of the FBO.

BEST COPY AVAILABLE

[17] 42 U.S.C. § 604a(f). The parallel subsection in S. 304 is § 701(c). In order that these employment protections be more clear to all concerned, while still achieving the intended purpose, the Department of Justice recommends that the "Employment Practices" subsection to § 701 be amended as set out below:

> (c) EMPLOYMENT PRACTICES.—
> (1) IN GENERAL.—In order to aid in the preservation of its religious character and autonomy, a religious organization that provides assistance under a program funded under this Act may, notwithstanding any other federal law pertaining to religious discrimination in employment, take into account the religion of the members of the organization when hiring, promoting, transferring, or discharging an employee.
> (2) TITLE VII.—The exemption of a religious organization ~~provided~~ under section 702(a), and the exemption of an educational institution under section ~~or~~ 703(e)(2) of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e–1(a), 2000e–2(e)(2)), ~~regarding employment practices~~ shall not be affected by the ~~religious~~ organization's or institution's provision of assistance ~~under~~, or receipt of funds from, pursuant to a program funded under this Act ~~described in subsection (b)~~. Nothing in this section alters the duty of a religious organization to otherwise comply with the nondiscrimination provisions in title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.).

This proposed amendment would ensure that FBOs may continue to staff on a religious basis. However, in this proposal religious considerations may not affect the terms of the compensation package. Hence, there is no intended "religious override" of minimum wage laws, or matters like social security or unemployment compensation. Additionally, under this proposal any employment nondiscrimination provisions imbedded in the underlying federal program legislation cannot affect an FBO's right to staff on a religious basis. Finally, the §§ 702(a), 703(e)(2) exceptions in Title VII, while not broadened in any respect, are expressly preserved.

[18] In addition to Title VII of the Civil Rights Act of 1964, *see, e.g.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (1994) (prohibiting discrimination on the bases of race, color, and national origin); Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1994) (prohibiting discrimination in educational programs and activities on the bases of sex and visual impairment); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994) (prohibiting discrimination against otherwise qualified disabled individuals, including individuals with a contagious disease or an infection such as HIV); The Age Discrimination Act of 1975, 29 U.S.C. § 706(8)(c) (1994) (prohibiting discrimination on the basis of age).

[19] *See* Blum v. Yaretsky, 457 U.S. 991 (1982) (holding that pervasive regulation and the receipt of government funding at a private nursing home does not, without more, constitute state action); Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (holding that a private school heavily funded by the state is not thereby state actor); Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 164 (1978) (holding that the enactment of a law whereby the state acquiesces in the private acts of a commercial warehouse does not thereby convert the acts of the warehouse into those of the state).

[20] That an act of religious staffing is not attributable to the government and thus not subject to Establishment Clause norms restraining actions by government has already been ruled on by the Supreme Court. *See* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 337 (1987) ("A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. . . . [I]t must be fair to say that the *government itself* has advanced religion through its own activities and influence."); *id.* at 337 n.15 ("Undoubtedly, [the employee's] freedom of choice in religious matters was impinged upon, but it was the Church ... and not the Government, who put him to the choice of changing his religious practices or losing his job.").

BEST COPY AVAILABLE

[21] 483 U.S. at 342-44 (Brennan, J., concurring).

[22] We acknowledge that many FBOs do not staff on a religious basis, nor do they desire to do so. But many others do, and desire to continue doing so. Further, many FBOs that staff on a religious basis do so with respect to some jobs but not others. Finally, many FBOs do not staff on the basis of religion in any affirmative sense, but they do require that employees not be in open defiance of the organization's creed. The employment practices of FBOs, as well as their religious motives, are varied and complex, yet another reason for government to eschew attempts to regulate the subject matter.

[23] 483 U.S. at 342-43 (Brennan, J., concurring).

[24] *Cf.* op-ed column by Nathan J. Diament, *A Slander Against Our Sacred Institutions*, Washington Post p. A23 (May 28, 2001) ("Their assumption is that faith-based hiring by institutions of faith is equal in nature to every other despicable act of discrimination in all other contexts. This is simply not true.").

[25] The nature and history of this expansion in the Equal Employment Opportunity Act of 1972 is set forth in *Amos*, 483 U.S. at 332-33. A co-sponsor of the 1972 expansion, Senator Sam Ervin, explained its purpose in terms of reinforcing the separation of church and state. The aim, said Senator Ervin, was to "take the political hands of Caesar off the institutions of God, where they have no place to be." 118 Cong. Rec. 4503 (1972).

[26] 42 U.S.C. § 2000e-1(a) (1994). Religious educational institutions are separately exempt under 42 U.S.C. § 2000e-2(e)(2) (1994).

[27] The Title VII religious exemption was upheld in Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987). *Amos* held that the exemption was not a religious preference violative of the Establishment Clause. Moreover, the Establishment Clause permits Congress to enact exemptions from regulatory burdens not compelled by the Free Exercise Clause, as well as regulatory exemptions that accommodate only religious practices and organizations. *Id.* at 334, 338.

[28] *See* Hall v. Baptist Memorial Health Care Corp., 215 F.3d 618, 625 (6th Cir. 2000) (dismissing religious discrimination claim filed by employee against religious organization because organization was exempt from Title VII and the receipt of substantial government funding did not bring about a waiver of the exemption); Siegel v. Truett-McConnell College, 13 F. Supp.2d 1335, 1343-45 (N.D. Ga. 1994), *aff'd*, 73 F.3d 1108 (11th Cir. 1995) (table) (dismissing religious discrimination claim filed by faculty member against religious college because college was exempt from Title VII and the receipt of substantial government funding did not bring about a waiver of the exemption or violate the Establishment Clause); Young v. Shawnee Mission Medical Center, 1988 U.S. Dist. LEXIS 12248 (D. Kan. Oct. 21, 1988) (holding that religious hospital did not lose Title VII exemption merely because it received federal Medicare payments); *see* Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991) (exemption to Title VII for religious staffing by a religious organization is not waivable); Arriaga v. Loma Linda University, 10 Cal.App.4th 1556, 13 Cal. Rptr.2d 619 (1992) (religious exemption in state employment nondiscrimination law was not lost merely because religious college received state funding); Saucier v. Employment Security Dept., 954 P.2d 285 (Wash. Ct. App. 1998) (Salvation Army's religious exemption from state unemployment compensation tax does not violate Establishment Clause merely because the job of a former employee in question, a drug abuse counselor, was funded by federal and state grants).

[29] 42 U.S.C. § 604a(f). The parallel subdivision in *S.* 304 is § 701(c).

BEST COPY AVAILABLE

[30] In regard to the constitutional and practical difficulties with sorting out, and then barring from program participation, those FBOs thought to fit that slippery category of "pervasively sectarian," the plurality in Mitchell v. Helms, 120 S. Ct. 2530 (2000), said as follows:

> [T]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs. . . . Although the dissent welcomes such probing . . . we find it profoundly troubling.

Id. at 2551 (citations omitted).

The problem is more thoroughly addressed at Vol. 42 Wm & Mary L. Rev. 883, 907-14 (2001) (collecting cases suggesting that to require distinguishing between pervasively and non-pervasively sectarian organizations is inconsistent with the Court's case law elsewhere holding that civil authorities should refrain from probing the inner workings of religious organizations).

[31] *See* Mitchell v. Helms, 120 S. Ct. 2530, 2558-59 (2000) (O'Connor, J., concurring in the judgment).

[32] *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (providing special education services to Catholic high school student not prohibited by Establishment Clause); Witters v. Washington Dept. of Servs. For the Blind, 474 U.S. 481 (1986) (upholding a state vocational rehabilitation grant to disabled student that elected to use the grant to obtain training as a youth pastor); Mueller v. Allen, 463 U.S. 388 (1983) (upholding a state income tax deduction for parents paying school tuition at religious schools); *see also* Rosenberger v. Rector and Visitors, 515 U.S. 819, 878-79 (1995) (Souter, J., dissenting) (distinguishing cases upholding indirect funding to individuals, admitted to be the law of the Court, from direct funding to religious organizations).

[33] 42 U.S.C. §§ 9858 - 9858q (1994).

[34] 120 S. Ct. 2530 (2000) (plurality opinion).

[35] *Id.* at 2556 (O'Connor, J., concurring in the judgment). Her opinion was joined by Justice Breyer. *See* Marks v. United States, 430 U.S. 188, 193 (1977) (when Supreme Court fails to issue a majority opinion, the opinion of the members who concurred in judgment on narrowest grounds is controlling).

[36] *Mitchell* does not speak—except in the most general way—to the scope of the Establishment Clause when it comes to other issues such as religious exemptions in regulatory or tax laws, religious symbols on public property, or religious expression by government officials. In that regard, *Mitchell* continues the splintering of legal doctrine leading to different Establishment Clause tests for different contexts.

[37] *Id.* at 2558-59.

[38] *Id.* at 2557. Justice O'Connor explained that by "neutral" program of aid she meant "whether the aid program defines its recipients by reference to religion." *Id.* at 2560. To be "neutral" in this sense, a grant program must be facially nondiscriminatory with respect to religion, and, where there is discretion in awarding a grant, nondiscriminatory as applied.

learning that some of the grants are awarded to FBOs. A finding of government endorsement of religion is unlikely unless a facially neutral program, when applied, singles out religion for favoritism. In *Mitchell*, Justice O'Connor did not utilize the alternative no-endorsement test when doing the *Lemon/Agostini* analysis. We follow her lead. She did, however, use the no-endorsement test for another purpose. *See id.* at 2559 (explaining why she thought the plurality was wrong to abandon the direct-aid/indirect-aid distinction).

[46] Religious neutrality, explained Justice O'Connor, ensures that an aid program does not provide a financial incentive for the individuals intended to ultimately benefit from the aid "to undertake religious indoctrination." *Mitchell*, 120 S. Ct. at 2561 (quoting *Agostini*).

[47] One of the aims of charitable choice is that faith-based and other community organizations be able to expand their capacity to provided for the social service needs of under-served neighborhoods. In that sense, then, charitable choice is supplemental. For many neutral programs of aid, application of the supplement/not-supplant factor would, if allowed to be controlling, conflict with long-settled precedent. For example, the Court has long since allowed state-provided textbooks and bussing for religious schools. *See* Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930) (textbooks); Everson v. Board of Educ., 330 U.S. 1 (1947) (bussing). Once the government provided textbooks and bussing, monies in a school's budget could be shifted to other uses, including to sectarian uses. Yet such aid is in apparent conflict with the admonition to supplement/not-supplant. *See also* Committee for Public Education v. Regan, 444 U.S. 646, 661-62 (1980), where the Court upheld aid that "supplanted" expenses otherwise borne by religious schools for state-required testing. Even the dissent in *Mitchell* concedes that reconciliation between *Regan* and an absolute prohibition on aid that supplants rather than supplements "is not easily explained." 120 S. Ct. at 2588 n.17 (Souter, J., dissenting). *Regan* suggests that no "blanket rule" exists. *Id.* at 2544 n.7 (plurality).

The Supreme Court's past practice is to trace the government funds to the point of expenditure, rejecting any requirement whereby government funds must not be provided where the public funds thereby " free up" private money which then might be diverted to religious indoctrination. *See Regan*, 444 U.S. at 658 ("The Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends."); New York v. Cathedral Academy, 434 U.S. 125, 134 (1977) ("this Court has never held that freeing private funds for sectarian uses invalidates otherwise secular aide to religious institutions").

[48] 120 S. Ct. at 2557, 2562.

[49] *Id.* at 2562. On at least one occasion the Supreme Court upheld direct cash payments to religious K-12 schools. *See* Committee for Public Education v. Regan, 444 U.S. 646 (1980). The payments were in reimbursement for state-required testing. Rejecting a rule that cash was never permitted, the *Regan* Court explained:

> We decline to embrace a formalistic dichotomy that bears so little relationship either to common sense or the realities of school finance. None of our cases requires us to invalidate these reimbursements simply because they involve [direct] payments in cash.

Id. at 658. *See also Mitchell*, 120 S. Ct. at 2546 n.8 (plurality noting that monetary assistance is not "*per se* bad," just a factor calling for more care).

Justice O'Connor explained that monetary aid is of concern because it "falls precariously close to the original object of the Establishment Clause prohibition." *Mitchell*, 120 S. Ct. at 2566. Part of that history, explicated in Everson v. Board of Educ., 330 U.S. 1 (1947), was the defeat spearheaded in Virginia by James Madison of a proposed tax. As more precisely explained by Justice Thomas, the legislation defeated in Virginia was a tax ear-marked for the support of clergy. Rosenberger v. Rector and Visitors, 515 U.S. 819, 852 (1995) (Thomas, J., concurring). Opposition to a tax ear-marked for explicitly religious purposes indeed does go to the heart of the adoption of the Establishment Clause. Charitable choice monies, however, come from general tax revenues, are awarded in a manner that is neutral as to religion, and do not fund sectarian practices.

[50] 120 S. Ct at 2561-68.

BEST COPY AVAILABLE

[51] Justice O'Connor's statement disclaiming future reliance on presumptions that employees of highly religious organizations cannot or will not follow legal restraints on the expenditure of government funds is as follows:

> I believe that our definitive rejection of [the] presumption [in *Agostini*] also stood for—or at least strongly pointed to—the broader proposition that such presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause.

Id. at 2567.

[52] *See id.* at 2561 (noting that *Agostini* rejected a presumption drawn from *Meek* and later *Aguilar*); *id.* at 2563-64 (quoting from *Meek* the "pervasively sectarian" rationale and noting it created an irrebutable presumption which Justice O'Connor later rejects); *id.* at 2567 (requiring proof of actual diversion, thus rendering "pervasively sectarian" test irrelevant); *id.* at 2568 (rejecting presumption that teachers employed by religious schools cannot follow statutory requirement that aid be use only for secular purposes); and *id.* at 2570 (rejecting presumption of bad faith on the part of religious school officials).

[53] While Justice O'Connor did not join in the plurality's denunciation of the "pervasively sectarian" doctrine as bigoted, her opinion made plain that the doctrine has lost relevance. Thus, while not taking issue with the plurality's condemnation of the doctrine as anti-Catholic, she in fact explicitly joined in overruling the specific portions of *Meek* that set forth the operative core of the "pervasively sectarian" concept. 120 S. Ct. at 2563.

[54] *Id.* at 2568.

[55] *Id.* A lower court recently applied this principle by striking down direct monetary payments, unrestricted as to use, to reimburse schools, including religious schools, to reimburse them for the cost of Internet access. *See* Freedom From Religion Foundation v. Bugher, 2001 WL 476595 (7th Cir. Apr. 27, 2001). Once received, the money went into general revenues and could later be used for sectarian purposes. On the other hand, the lower trial court decision in the same case upheld a parallel program whereby the state provided a below-cost Internet link to schools, including religious schools. Hence, the aid could not be diverted to sectarian use. 55 F. Supp.2d 962 (W.D. Wis. 1999). While on appeal, the plaintiffs' challenge to this parallel program was dropped when, in the interim, *Mitchell v. Helms* was handed down.

[56] 120 S. Ct. at 2569.

[57] *Id.*

[58] *Id.*

[59] *Id.*

BEST COPY AVAILABLE

[60] Id. at 2569-70.

[61] *Id.* at 2571-72.

[62] *Id.* at 2572 ("[r]egardless of whether these factors are constitutional requirements . . .").

[63] Monetary payments are just a factor to consider, not controlling. This makes sense given Justice O'Connor's concurring opinion in *Bowen v. Kendrick*, wherein she joined in approving cash grants to religious organizations, even in the particularly "sensitive" area of teenage sexual behavior, as long as there is no actual "use of public funds to promote religious doctrines." Bowen v. Kendrick, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring). *See also supra* note 49.

[64] The Department of Justice recommends that S. 304 be clarified by the following amendment:

> (h) LIMITATIONS ON USE OF FUNDS; VOLUNTARINESS ~~FOR CERTAIN PURPOSES~~.- No funds provided through a grant or cooperative agreement ~~contract~~ to a religious organization to provide assistance pursuant to ~~under~~ any program funded under this Act ~~described in subsection (a)~~ shall be expended for sectarian instruction, worship, ~~instruction;~~ or proselytization. If the religious organization offers such an activity, it shall be voluntary for the individuals receiving services and offered separate from the program funded under this Act. A certificate shall be separately signed by religious organizations, and filed with the government agency that disbursed the funds, certifying that the organization is aware of and will comply with this subsection. Failure to comply with the terms of the certification may, in addition to other sanctions as provided by law, result in the withholding of the funds and the suspension or termination of the agreement.

[65] Justice O'Connor nowhere defined what she meant by "religious indoctrination." However, elsewhere the Supreme Court has found that prayer, devotional Bible reading, veneration of the Ten Commandments, classes in confessional religion, and the biblical creation story taught as science are all inherently religious. 42 Wm & Mary, *supra* note 30, at 915 (collecting cases).

[66] In the Substance Abuse and Mental Health Services Administration reauthorization the segregation of accounts is required. 42 U.S.C. § 300x-65(g)(2). This improves accountability, especially in helping to avoid diversion to "religious coffers," with little loss of organizational autonomy. The parallel subsection in S. 304 is § 701(f)(2).

[67] *See* 42 U.S.C. 300x-65(g)(1).

[68] *See* 42 U.S.C. 300x-65(i).

[69] All federal programs involving financial assistance to nonprofit institutions require annual audits by a certified public accountant whenever the institution receives more than $300,000 a year in total federal awards. Executive Office of the President of the United States, Office of Management and Budget, Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations, 62 Fed. Reg. 35289 to 35302 (June 30, 1997). The independent audit is not just over financial expenditures, but includes a review for program compliance.

[70] *See* notes 15 and 64, *supra*, for an example of a "Certification of Compliance" requirement drafted into the charitable choice provision.

[71] A self-audit subpart for insertion into S. 304 at § 701(f), would read as follows: "An organization providing services under a program described in this section shall conduct annually a self audit for compliance with its duties under this section and submit a copy of the self audit to the appropriate Federal, State, or local government agency, along with a plan to timely correct variances, if any, identified in the self audit."

Senator SCHUMER. Thank you, Mr. Esbeck, and we appreciate your concise testimony. Your entire statement, as I mentioned, will be read in the record. Let me just ask you a couple of questions here.

Now, let me ask you this one: Do you read S. 304 so that it would allow a faith-based group that takes Federal grants to refuse to hire not just someone of a different religion but, say, someone who has a different lifestyle the group disapproves of, children outside of marriage, sexual orientation?

BEST COPY AVAILABLE

Mr. ESBECK. Under Title VII—and I should say charitable choice just sort of incorporates the Federal civil rights regime that is there. Under 702(a), a religious organization can continue to staff on a religious basis. Or if you want to put that in the negative, they can continue to, but not on lifestyle matters.

Senator SCHUMER. But not on lifestyle matters. Okay, thank you.

If religious groups that receive Federal funding aren't going to engage in worship or religious instruction in the programs they run, then just tell the Committee why they would need to be allowed to refuse to hire adherents of other faiths to administer nonreligious programs. Obviously, if it is a religious program, it would be a different issue.

Mr. ESBECK. That is a good and commonly asked question and it has to do with a matter of perspective. Of course, from the Government perspective, to supply housing for the homeless or food for the hungry, that is secular business. But from the standpoint of the faith-based organization, it is religiously motivated.

A good way to think about this is think of the ministry of Mother Teresa. Obviously, from the Government's perspective she is doing secular work because she is tending to the sick and to the dying. But obviously from the standpoint of her and the religious order that she represents, she is doing this as a matter of mercy or a mission of mercy out of her religious motivation. So they obviously want to gather people who are of like-minded faith.

Senator SCHUMER. Now, in your testimony you give the example of a faith-based welfare-to-work program in Philadelphia that engages in Bible study that you believe to be constitutional because it wasn't funded by the Government. It took place during a break in the job training class and it was held in a different room from the job training class. You seem to be saying that this sort of separation was the sort of model you need to comply with the Constitution.

This is, to me, one of the most difficult questions. I am not adverse to seeing religious organizations perform activities. When I wrote the crime bill, I made sure that churches, for instance, could run after-school programs because in many communities that was the best place to run them.

But what happens if the faith-based program doesn't separate religious study out of the social program? Let us say we have the "come to God, get yourself off drugs"—or "come to Jesus," but I don't want to involve one religion or another, so "come to God, get yourself off drugs" program, and the program is Bible study and let's say it works. Should that be funded?

Mr. ESBECK. Let me ask you to turn to the bottom of page 5 of my prepared remarks. In that footnote, what we set forth there for the Department of Justice is our sort of codification, if you will, of the constitutional parameters that come out of the recent court opinion, *Mitchell* v. *Helms* of last year, which built upon *Agostini* v. *Felton* from 1997.

Let me state it and then point you to the particular sentence. Again, it is footnote 15, bottom of page 5.

Senator SCHUMER. Footnote 15, yes. It is nice that you told us it was page 5, but we don't have numbers on the pages.

Mr. ESBECK. Sorry.

Senator SCHUMER. So footnote 15. Thanks.

Mr. ESBECK. Let me just sort of state it directly. In the government-funded program, there cannot be sectarian activity.

Senator SCHUMER. Correct.

Mr. ESBECK. And, of course, a Bible study would be sectarian activity. So with reference to this proposed amendment to the bill, if you will look at the second sentence—the first sentence, of course, is just a rewriting of the sentence which is in the bill, but this codifies the two rules that I mentioned in my opening remarks, one of which is directly pertinent here.

It says, "If the religious organization offers such activity," which is sectarian activity, "it shall be voluntary for the individuals receiving the services and offered separate from the program funded under the Act." So the sectarian activity, if it is a Bible study, has to be offered separate from the government-funded program. In that particular example, it was a readiness to work program funded by welfare-to-work funds. But that study was separate, and also it was very clear that it was completely volitional.

Senator SCHUMER. Okay, so let me just give you the hypothetical of a program whose major method, say, in drug treatment was Bible study and 90 percent of it was Bible study. You would say that could not be funded?

Mr. ESBECK. That could not be directly funded under the parameters of *Mitchell* v. *Helms*, that is right.

Senator SCHUMER. And the bill doesn't attempt to change that? It is a tough question. I mean, it is a tough question.

Mr. ESBECK. Not only doesn't it change it, but it writes a rule which makes it clear that they cannot do that.

Senator SCHUMER. All right. Let me ask you this one; this is about *Mitchell* as well. Justice O'Connor's controlling opinion places importance on the fact that Federal funds did not, quote, "reach the coffers of a religious school" in that case. Rather, the State paid for books and other materials that were loaned to religious schools.

In the case of S. 304 and other charitable choice bills, Federal money would go directly into the coffers of religious groups, which would free up money to pay for religious activities. Do you think this is permissible under Justice O'Connor's opinion?

Mr. ESBECK. What Justice O'Connor had there were several factors which she pulled out which she saw as, and I think rightly so, preventing diversion of Government funds to sectarian activities, which, of course, violates her rule. Under charitable choice, it is required that separate accounts be kept, and the Government funds have to be kept in these separate accounts so that any funds from that account cannot be diverted to sectarian activities.

Senator SCHUMER. So you are saying the funds couldn't be diverted to that activity, but if the funds took the place and then the privately-raised funds by the religious organization were used for that activity, that would be okay?

Mr. ESBECK. Yes. The Supreme Court under the Establishment Clause, even going way back to the 1930's, has rejected the interpretation of the Establishment Clause or the so-called freed-up funds theory. That has never been—

Senator SCHUMER. I agree with you there. I don't think that that is fair to say, well, you get the money for this, then you can use your own money for that. But that is the very argument the President is making in terms of family planning money, because the present law doesn't allow us to fund family planning activities overseas. But the President has said repeatedly it is fungible. So if we give money to this group to do allowed activities, then they can use their own money for family planning. It is a total contradiction.

How would you, as a member of the administration, resolve that contradiction?

Mr. ESBECK. It depends upon what constitutional doctrine you are using there. We just used the one under the Establishment Clause, but in the Mexico City policy the question there is what is the scope of the Federal spending power. That is a completely different test. The Court has said as a matter of constitutional law that the Government can choose to withhold funds under its spending power to achieve public policy purposes.

Senator SCHUMER. I have other questions which I would ask unanimous consent be submitted in writing.

They have called a vote, so I want to give my colleague, Senator Hatch, a chance to ask questions before we briefly recess for that vote.

Senator Hatch?

Senator HATCH. Thank you.

Senator SCHUMER. If you don't mind, Orrin, I will go vote while you are asking the questions and come right back.

Senator HATCH. If you can hurry back, yes, I will recess if you don't get back in time.

Senator SCHUMER. Good. We have held you up long enough and we won't hold everybody up longer. Thanks.

Senator HATCH. Mr. Esbeck, Senator Santorum and Representative Scott were asked what exemptions exist in Title VII for religious discrimination in hiring by a religious organization. I believe the question referred to whether Catholic Charities can say we will only hire Catholics.

For clarification purposes, can you just elucidate on that?

Mr. ESBECK. Right. Under Title VII, the 702(a) exemption, which is for religious organizations who choose to staff on a religious basis—Catholic Charities can have a rule that we hire only Catholics. I recognize they don't have that, but they can if they want to, and I believe that was the question that Senator Biden was asking.

Senator HATCH. The critics of charitable choice seem to argue that members of faith-based organizations simply cannot be trusted to follow guidelines preventing the use of Government funds for proselytizing activities. Hasn't this argument been decisively rejected by the Supreme Court in the past?

Mr. ESBECK. Yes. Again, that takes us back to *Mitchell* v. *Helms*. The controlling opinion there says that within the government-funded program there is to be no sectarian activity. Obviously, proselytizing is a sectarian activity. It is one of those three specifically called out in the charitable choice statute.

But the difference that we have here—I mean, several prior questions were, well, then what is the difference between the prior system and charitable choice? Actually, it is quite a lot. What charitable choice does is it ends the discrimination against those who have a high religiosity or have a high profile in their religious character.

Under the old regime, they could not even qualify for applications for grant funding, but now it shifts the debate. It is no longer who are they, but what can they do, what are they willing to do. So they continue to have a high level of religiosity, but if they are prepared to structure a federally-funded program in a way that meets those *Mitchell* v. *Helms* parameters and keep sectarian activity out of that, they can do that.

Senator HATCH. Well, some have expressed concern over Government's entanglement with religion under the *Lemon* test, I suppose. But hasn't the Supreme Court made clear that where there are adequate safeguards, Government funds may constitutionally be awarded to faith-based organizations for the delivery of social services?

Mr. ESBECK. Yes. Again, we can look to *Mitchell*, but there are many other cases that deal with that. The controlling opinion there again said, sure, there has to be some monitoring, of course, to prevent this diversion of Government funds to sectarian activity, but you no longer need to have this pervasive, almost brooding daily monitoring of these organizations. So that sort of excessive entanglement test has been much toned down, I would say, on the current Court.

Senator HATCH. It is my understanding that charitable choice provisions do provide for a variety of safeguards to prevent their unconstitutional application. Isn't it true, for example, that in order to obtain any Government funds, faith-based organizations must demonstrate that they can effectively deliver the services that they are promising and that they have to respect clients' civil liberties and account for all public money spent?

Mr. ESBECK. Yes, all three of those things are true. If they can't deliver the services, they are simply not going to be competitive in trying to get the grant.

Senator HATCH. Well, some critics claim that it is unconstitutional for direct grants to be awarded to, quote, "pervasively sectarian," unquote, organizations that would risk, quote, "an excessive entanglement of Government with religion," unquote.

However, the so-called pervasively sectarian test was first articulated in *Lemon* v. *Kurtzman*. The last case in which the Court struck down governmental aid using the pervasively sectarian test was *Grand Rapids School* v. *Ball*, as I understand it, but *Ball* was recently discredited, I believe, and partly overruled in *Agostini* v. *Felton*. Even Justice Blackmun, in a dissenting opinion joined by Justices Brennan, Marshall and Stevens, described the phrase, quote, "pervasively sectarian," unquote, as, quote, "a vaguely defined term of art," unquote.

Is it your view that the pervasively sectarian test really has been discredited?

Mr. ESBECK. It is now irrelevant. That is my view. Let me explain just briefly why. It is a presumption, and the Court in *Mitchell* v. *Helms*, when you put the four-judge plurality together with Justice O'Connor's two-judge opinion, it is pretty clear that there is to be no operative presumption that when an organization of high religiosity receives Federal funds that they are presumed to have diverted those to sectarian activities. Justice O'Connor made it clear there has got to be actual proof of diversion, so the presumption is gone.

Senator HATCH. Well, thank you. I hate to have you wait, but I am not sure that colleagues on the other side or our side will have questions when I return. But I am going to have to recess so I can get over and vote. I am stuck with a whole wide variety of meetings, so I may not be able to return, but I just want to thank you for being willing to be here and for your, I think, very careful elucidation of what this bill is all about, or what faith-based aid is all about.

So with that, we will recess until Senator Schumer or others can get back.

[The Committee stood in recess from 12:01 p.m. to 12:13 p.m.]

Senator SCHUMER [presiding]. Again, I apologize. We had a vote on the education bill.

Mr. Esbeck, thank you. I don't have any further questions. If I do, I will submit them in writing and, with unanimous consent, ask that you respond within a reasonable period of time.

I would like to call panel three forward. They are: Reverend Dr. W. Wilson Goode, Sr., Dr. Charles G. Adams, Rabbi David Zwiebel, Reverend Eliezer Valentin-Castañon, Mr. Edward Morgan, Mr. John Avery, Mr. Wade Henderson, Mr. Nathan Diament, Mr. Doug Laycock, and Mr. Richard Foltin.

It is a very full panel, but we are trying to accommodate everybody, given the schedule. So I am going to ask each member of the panel to adhere strictly to the five-minute rule, and the Committee would not look askance if you could say what you had to say in less than 5 minutes.

To save a little time, I am to just ask unanimous consent that instead of reading everybody's biography we just have it inserted into the record.

Senator SCHUMER. We will begin with Dr. Goode. Thank you very much for coming, Dr. Goode.

STATEMENT OF REVEREND DR. W. WILSON GOODE, SR., SENIOR ADVISER ON FAITH-BASED INITIATIVES, PUBLIC/PRIVATE VENTURES, AND RECTOR, AMACHI PROGRAM, PHILADELPHIA, PENNSYLVANIA

Reverend GOODE. Mr. Chairman, good morning. I come in support of S. 304 and I just want to really make a couple of comments.

I am W. Wilson Goode, Senior Adviser on Faith-Based Initiatives, Public/Private Ventures, and Chairman of the Mayor's Commission on Faith-Based and Community Initiatives. I come to speak of a specific problem that the bill addresses, and that is children of incarcerated parents.

There are 2.2 million children in the country whose parents are incarcerated, and if indeed we include those who are on probation and parole, there are at least 20 million children who fall in that category. These children are the most at-risk in our society. They suffer from high rates of child abuse and neglect, illiteracy, drug and alcohol abuse, crime, violence, and 70 percent of them become incarcerated themselves. They also suffer from premature death.

Research shows that having a mentor will have a significant reduction on young persons and that they will not involve themselves in drugs and alcohol. It will improve their school performance and attendance, and reduce the incidence of violence and improve their relationships with their custodial parents.

Through grants from the Pew Charitable Trust and William E. Simon Foundation, Public/Private Ventures has developed the Amachi Program. "Amachi" means "who knows what but God has brought us through this child." The goal of the program is to involve a consistent, caring adult in the life of a child whose parents are in jail.

In partnership with Big Brothers, Big Sisters, the local congregation, and the Center for Research on Religion and Urban Civil Society at the University of Pennsylvania, Public/Private Ventures has started the Amachi Program. To date, 550 volunteers have been identified and recruited from 43 congregations in 4 geographic areas of Philadelphia where there are large concentrations of children whose parents are in jail. We believe that we can give these children a real chance at not going to jail themselves.

The mentors are given criminal background checks, child abuse checks, and trained and interviewed before a match with a child takes place. The caretakers and the children are interviewed before the match. The bringing together of the child and the mentor is done under the high national standards of Big Brothers/Big Sisters of America. The local Big Brothers/Big Sisters indeed will monitor the match.

To date, we have recruited over 550 adults as mentors. We expect to have 600 by the end of June, and we have recruited more than 800 children on rosters whose caretakers and parents have agreed to let them be mentored.

Senator SCHUMER. One minute, Reverend Goode.

Reverend GOODE. To date, 250 of these children have been matched with a mentor. We expect to have 600 by August 1.

In conclusion, let me just simply say that I believe that by having resources available to local faith institutions, we can redirect the lives of young people. Without this intervention, without a loving, caring adult in their lives, without intervening in their lives, they will end up in jail themselves. There is no better way, in my view, to turn the lives of young folks around and reduce our prison population and change the entire culture of communities than through a program like this.

Thank you for your time, sir.

[The prepared statement of Reverend Goode follows:]

STATEMENT OF REV. DR. W. WILSON GOODE, SR., SENIOR ADVISOR ON FAITH-BASED INITIATIVES, PUBLIC/PRIVATE VENTURES

I am W. Wilson Goode, Sr., Senior Advisor on Faith-Based Initiatives for Public/Private Ventures (P/PV). I come to this job after more than 35 years of active community and government service: I served for 10 years as the head of a local civic/neighborhood organization. I have also served as both Mayor and City Manager of Philadelphia. Most importantly, I have been a member of the same congregation for 47 experience.

I will not address in this testimony all aspects of 5.304, but will focus on the charitable choice provision that will allow faith-based organizations to compete for government contracts to provide numerous services, including mentoring and drug treatment services.

Let me add that I know firsthand the value of faith-based institutions being allowed to compete for government contracts and services. From 1966 to 1978, I worked with 50 faith-based organizations that utilized various housing programs to construct over 2,000 housing units for low and moderate-income families. As Mayor of Philadelphia from 1984 to 1992, I allowed faith-based organizations to compete for various social service contracts. These faith-based groups received more than $40 million annually. I have now put all my experience to work in the area of faith-based initiatives. I have done so because I believe it is the best hope for solving many of the social problems facing our urban and rural areas.

This morning, I want to focus my comments on mentoring. Specifically, I want to talk about children whose parents are incarcerated, on probation or on parole. I believe these children are the most at-risk children in our country. Moreover, there are 2.2 million of them whose parents are in federal, state and local jails. If we add to this list those parents who are on probation or on parole, the number of children is over 20 million.

Through a grant from The Pew Charitable Trusts and the William E. Simon Foundation, Public/Private Ventures has developed a model that we believe will respond to these children. Here is the model:

AMACHI MENTORING PROGRAM

By every measure, children of current and former prisoners are among the most severely at-risk children and youth, as they suffer from high rates of child abuse and neglect, illiteracy, drug and alcohol abuse, crime, violence, incarceration and premature death. Although there is no single approach to measurably improving the life prospects of these children, P/PV's evaluation of Big Brothers Big Sisters of America (BBBSA) documented that having a mentor significantly reduces a young person's initiation of drug and alcohol use, improves their school performance and attendance, reduces their incidences of violence, and improves their relationship with their custodial parent. Providing the children of incarcerated parents with this kind of support is the focus of the Amachi mentoring program. *The goal is to involve consistently caring and supportive adults in the lives of prisoners' children.*

Amachi is a West African word meaning, "Who knows but what God has brought us through this child." It is our hope that this name will reflect the spirit of hope for children that will unify all of our partners, both secular and faith-based.

Amachi is a partnership of P/PV, the Big Brother Big Sister Association, local congregations and the Center for Research on Religion and Urban Civil Society at the University of Pennsylvania.

THE AMACHI MODEL

Volunteer mentors recruited by congregations will be matched with the children of current or former prisoners. The Amachi program offers three types of mentoring programs:

1. Community-based, one-to-one mentoring perfected by BBBSA over many years, which pairs one child with one mentor who meet weekly for at least one hour, choosing their own activities, schedule and location;
2. School-based, one-to-one mentoring, in which the pair meets at the child's school at least one hour a week at a time cleared with school administrators, and engages in either recreational or educational activities; and
3. Church-based, one-to-one mentoring similar to school-based mentoring with the exception that the mentoring pair meets on church property rather than at the school.

Big Brother Big Sister case managers screen the volunteers and provide case management and supervision for all of the matches.

In training volunteers, emphasis will be on the developmental approach identified in the P/PV study of BBBSA as more productive than a prescriptive approach that only offers youth such advice as "stop drugs" or "go to church." Instead, volunteers will be trained to focus on developing trust, engaging in enjoyable activities and waiting for the youth to ask the mentor for guidance.

PROJECT ORGANIZATION

Amachi staff are working with pastors to identify children of prisoners from their churches' communities and with prison chaplains to solicit child information from prisoners. Both incarcerated parents and custodial parents are asked for permission to engage the children in the mentoring program.

At the same time, staff have identified 43 congregations that are willing and able to participate in mentoring. More than 550 mentoring volunteers have come from these churches. Additional congregations, representing all faiths, will be added in ensuing years.

The churches are organized into four clusters of 10 to 12 churches per cluster in Southwest Philadelphia, West Kensington, North Central Philadelphia and South Philadelphia. These areas were chosen because of the great number of children of incarcerated parents in these areas as well as P/PV staff's familiarity with the congregations and neighborhoods.

One religious organization in each cluster has hired a Community Impact Director to manage the recruitment of volunteers, as well as volunteer pre-match training and post-match support. In turn, each of the 43 churches will designate a Church Coordinator, who will help mobilize and support the volunteers once they begin meeting with youth. Finally, each congregation will be responsible for maintaining at least 10 volunteer mentors in Amachi at all times. Continued participation in the project will be based on the cluster maintaining that number of volunteers.

As of today, 550 volunteers have been recruited from congregations located in the four selected Amachi neighborhoods and from one suburban congregation. To date, BBBS staff and volunteers have screened, trained and approved 542 of the 550 volunteers. These Amachi volunteers represent an 84% increase in the number of mentors involved with the local BBBS affiliate. Of the 542 volunteers, 363 are females and 179 are males. A concentrated effort has been underway since March to specifically recruit additional male mentors. Amachi staff have identified 800 children interested in having an Amachi mentor.

BBBS staff are currently engaged in an intensive effort to match children and volunteers. Two hundred fifty matches have been made to date, and the goal is to make 600 total matches by August 1, 2001.

As you can see, the Amachi program is working well. Already there are testimonies from children and mentors of lives being changed. I humbly urge you to support this effort and other faith-based efforts. Let me quickly mention one other program at Public/Private Ventures. Although it is not related directly to your Bill 304, it is indirectly related. Illiteracy keeps many children in darkness. Illiterate children and adults are at greater risk of committing crimes, selling drugs, and ending up in prison. The YET Center model could change much of that.

YET PROGRAM

In March 2000, Public/Private Ventures made grants to 21 faith-based organizations, representing a variety of settings from storefronts to large congregations, to develop literacy programs for those ages 4 to 24 years. The Youth Education for Tomorrow (YET) Centers are funded by The Pew Charitable Trusts and the Annie E. Casey Foundation and currently serve approximately 600 young people.

Each YET Center operates four or five days each week with 90-minute daily sessions for those who are deficient in reading and language skills one to three years below grade level. Professional teachers are hired by the institutions and assisted by volunteers. The program consists of four parts: an oral language/vocabulary activity, a student writing activity, a basic reading program, concluding with an adult reading to the students from library-recommended books. All centers are using the model, and for the school-year programs that started in the fall, mid-year testing in January revealed that after only three and a half months students gained an average of almost one school year in reading achievement, with older students gaining several years. While testing, intake procedures and monitoring are new to these faith-based settings, all have been using the model.

SUMMARY

I appreciate the opportunity to testify on 5.304 and to present you with a faith-based mentoring model for children of inmates, which has already resulted in measurable success. The fact that 250 children of inmates and volunteer mentors have been identified, trained, and matched in a short period of time (5 months) shows both the need for and willingness of faith-based organizations to be involved in the various drug treatment and prevention provisions that the charitable choice component of 5.304, *Drug Abuse Education, Prevention, and Treatment Act of 2001*, seeks to provide. I have also noted the literacy model because there is a strong connection between illiteracy rates in children and subsequent drug use and crime.

Again, thank you for the opportunity to testify before you, and I wish you well in the passage of this important legislation.

Senator SCHUMER. Thank you. Of course, Dr. Goode had years of experience in the political arena as mayor and understood the need to stay within the five-minute rule, and I hope all of the other gentlemen who are here, probably not having held elected office, will follow his fine example.

Dr. Adams?

STATEMENT OF REVEREND CHARLES ADAMS, PASTOR, HARTFORD MEMORIAL BAPTIST CHURCH, DETROIT, MICHIGAN

Reverend ADAMS. Thank you, Senator Schumer. I am Charles Adams, Pastor of Hartford Memorial Baptist Church in Detroit, Michigan. I am a former president of the Progressive National Baptist Convention, Incorporated, which was the denominational home of Martin Luther King, Jr., whom I will quote in this statement.

I am also a member of the Baptist Joint Committee on Public Affairs and served as its chairman, and what I have is essentially the message written by our executive director who is a pastor and a lawyer, the Reverend Dr. Brent Walker.

All of my religious affiliations focus aggressively on public policy issues concerning religious liberty and its constitutional corollary, the separation of church and state. Religion has thrived in this country because the separation has been maintained. To endanger that is, of course, to take away religious liberty as we now know it.

Charitable choice is wrong-headed; it wants to do right, but it wants to do it in the wrong way. First, it is unconstitutional. It promotes religion as a healing therapy in ways that breach the wall of separation between church and state. Now, there are many protections against breaching that wall, and we do not think that that protection is going to be advanced through charitable choice, but weakened.

Secondly, it violates the rights of taxpayers. There is no reason why my tax monies should promote anybody's religion for any purpose.

Thirdly, charitable choice results in excessive entanglement with religion. If Government makes a contract with a religious group, it is entering into the substance of that group's religion.

Fourthly, charitable choice dampens religion's prophetic voice. Religion has historically stood outside of Government control, serving as a critic of Government. How can religion continue to raise the fist against Government tyranny when it has an open hand receiving Government favors?

Dr. Martin Luther King, Jr., arguably the 20th century's best example of religion's prophetic voice, said "The church must be reminded that it is not the master or the servant of the state, but rather the conscience of the state. It must be the guide and critic of the state and never its tool. If the church does not recapture its prophetic zeal, it will become an irrelevant social club without moral authority." There are political implications in accepting money from Government. Are churches now to be the tools of one political regime rather than another?

Fifthly, charitable choice authorizes religious discrimination in employment. We dare not turn back the clock on civil rights in order to expand social services for the needy.

Sixth, charitable choice encourages unhealthy rivalry and competition among religious groups. We enjoy religious peace in this country, despite our dizzying diversity, for the most part because Government has stayed out of religion. Representative Chet Edwards from Texas said that he an think of no better way to destroy religion in America than to put a pot of money out there and let all the churches fight over who gets it. Charitable choice is a recipe for religious conflict.

We hope that if you read the Baptist Joint Committee's book on keeping faith, you will notice the right ways that Government can help churches and other religious organizations perform public services that are necessary. We can keep the faith without changing the law. The law is good; let it stay as it is.

Senator SCHUMER. Thank you, Dr. Adams.

Our next witness is Rabbi David Zwiebel, someone I have had the pleasure of knowing for a very long period of time.

Rabbi Zwiebel, from my home State of New York.

STATEMENT OF RABBI DAVID ZWIEBEL, EXECUTIVE VICE PRESIDENT FOR GOVERNMENT AND PUBLIC AFFAIRS, AGUDATH ISRAEL OF AMERICA, NEW YORK, NEW YORK

Rabbi ZWIEBEL. Thank you, Mr. Chairman. I serve as Executive Vice President for Government and Public Affairs of Agudath Israel of America, which is a 79-year-old national Orthodox Jewish organization. I am an attorney by profession, but my assigned role here today is to speak not so much as a lawyer but as an executive of a faith-based group that has had experience in the administration of government-funded social service programs.

For the past quarter century or so, Agudath Israel, among its various other activities, has sponsored a variety of social service projects, most of them in the New York City area, which have serviced many thousands of needy persons.

Let me draw on our experience to offer four observations concerning the charitable choice initiative. The first relates to the motivation of faith-inspired service providers.

When Agudath Israel decided in the mid-1970's to go into the area of social services for the needy, we were motivated not merely by some general humanitarian concern, certainly by some organizational need to establish a new service bureaucracy, but because we saw it as a "mitzvah," if I may, a good religious deed.

While the actual services we have provided have been non-sectarian in nature, they have also been infused with an underlying spirit of holy service, and I dare say that a large measure of the effectiveness of our programs is attributable to the religious vision and animates our service.

A second point: While our programs are open to all needy persons, regardless of religious identity or observance, the fact is that many of our clients are our own constituents, Orthodox Jews who have known and identified with Agudath Israel for many, many years.

This should hardly come as a surprise. A social service provider that has its roots in the community, that understands the unique characteristics and sensitivities of the community, that enjoys the confidence of the community, has a leg up in being able to effectively assess and address the needs of the community. And while there are other types of community-based organizations that can fulfill a similar role, there is no question that religious institutions are often the very institutions that retain the greatest level of trust and credibility at the grass-roots level.

Third, many of the people we serve have had problems in their lives. They come to us because they are determined to turn their lives around, to find new hope, a new faith, a new beginning. Quite frankly, when they do so, some of them have God on their minds. These people choose Agudath Israel precisely because they know the type of organization we are, and while we are meticulous in ensuring that the social services we provide are entirely non-sectarian, we do try to accommodate those of our clients who are looking for religious counseling, working with them after hours, referring them to a rabbi or a Jewish education program, facilitating their desire to come closer to their faith and to their God.

Hence, my point: While Government ought not fund sectarian activities, at the same time Government ought not exclude from the social service mix the very institutions to which so many needy Americans are likely to turn for service precisely because of the added spiritual dimension that those institutions are able to offer.

So long as no Government funds are used for religious activities, so long as no beneficiary is compelled to participate in religious activities, so long as the funded services are entirely separable from the provider's religious activities, neither law nor logic can justify the exclusion of faith-based providers simply because they also make religious services available to their clients.

My fourth and final point relates to the civil rights issue we have been discussing today. I elaborate on this in my written testimony, but the bottom line is that if Government chooses to enlist religious groups to help address the Nation's urgent social needs, it must do so in a manner that allows a faith-based organization to remain faithful to its base.

The genius of America has been its ability to strike the appropriate balance between the sometimes competing values of promoting equality and respecting diversity. Insisting that all faith-based providers sacrifice their religious principles and practices as the price they must pay if they wish to service the needy with Government funds would upset that delicate balance and do violence to the foundation block of religious freedom upon which our society has been built. Let's not steamroll religious liberty in the name of civil rights. Let's remember that religious rights are civil rights, too.

Thank you.

[The prepared statement of Rabbi Zwiebel follows:]

STATEMENT OF DAVID ZWIEBEL, EXECUTIVE VICE PRESIDENT FOR GOVERNMENT AND PUBLIC AFFAIRS, AGUDATH ISRAEL OF AMERICA, NEW YORK, NEW YORK,

Mr. Chairman, Members of the Committee:

My name is David Zwiebel. I serve as executive vice president for government and public affairs for Agudath Israel of America, a 79-year-old national Orthodox Jewish movement. I am a rabbi, and an attorney by profession; and I also serve as Agudath Israel's general counsel.

It is my assigned role here today to speak not so much as a lawyer, but as an executive of a faith-based organization that has had experience in the administration of government-funded social service programs, and that fully supports the expansion of the federal "charitable choice" program. For the past quarter-century or so, Agudath Israel, among its various other activities, has sponsored a variety of social service projects, most of them in New York City, running the gamut from employment training and placement to housing and neighborhood stabilization, from mentoring programs for at-risk youth to visitation programs for homebound and institutionalized seniors. These activities, which have serviced many thousands of needy persons, have been subsidized through a variety of government grants. In my testimony today, I will draw on several aspects of Agudath Israel's experience to offer a number of observations concerning the charitable choice initiative currently under consideration.

1. *The Motivation of Faith-Inspired Service Providers*: When Agudath Israel decided in the mid-'70's to go into the area of social services for the needy, we were motivated not merely by some general humanitarian concern, certainly not by some organizational need to establish a new service bureaucracy, but because we saw it as a "mitzvah"—if not quite a religious obligation, then at least a good religious deed. Helping an unemployed breadwinner or a widowed homemaker find a job, bringing cheer and companionship to a lonely senior, working with troubled teens—all of these and many more are part of a Jew's religious mandate on this earth to perform "tzedakah", righteous acts of charity; and we at Agudath Israel were determined to do whatever we could to carry out that mandate on a communal basis. While the actual services we have provided over the years have been non-sectarian in nature, they have also been infused with an underlying spirit of holy service—and I dare say that a large measure of our effectiveness is attributable to the religious vision that animates our service.

Which brings me to the first general point I would like to make: When government enlists faith-based groups like ours to help address urgent social needs, it enlists groups that approach this task with a special dedication and devotion that can make a tangible difference in the quality of the service they provide. It would be an unfortunate loss for our caring society were that extra ingredient of motivation, enthusiasm and effectiveness excluded from the government funded service mix.

2. *The Grassroots Credibility of Faith-Based Organizations:* Agudath Israel's programs are open to all needy persons, regardless of religious identity or observance. Many of our "clients" are not Jewish, and many of our Jewish clients are not Orthodox or otherwise observant. We don't ask the people we serve what their faith is; nor do we maintain records of such matters, for they are entirely irrelevant to the services we provide.

At the same time, I would be less than fully candid with this committee were I to suggest that the overall profile of our social service clientele mirrors that of the general society around us. The reality is that a disproportionately high percentage of the people who seek out our social services are our own constituents—needy Orthodox Jews who have known and identified with Agudath Israel for many, many years.

This should hardly come as a surprise, and leads me to the second general point I'd like to make. When public policy makers ponder how most effectively to service needy Americans, a significant factor in the overall equation should be the comfort level that the intended beneficiary will have with the service provider. That, in turn, will often hinge on the credibility the provider enjoys within the community. A social service provider that has its roots in the community, that understands the unique characteristics and sensitivities of the community, that is respected by and enjoys the confidence of the community—that provider will start with a significant leg up in being able effectively to assess and address the needs of the community. And, while there are other types of community-based organizations that can fill a similar role, there is no denying that religious institutions are often the very institutions that retain the greatest level of trust and credibility at the grassroots level where it is needed most in reaching needy Americans.

3. *The Spiritual Dimension of Certain Clients' Needs:*Coming back to Agudath Israel's client base, a good number of the people we serve have had problems in their lives. Some of them have engaged in unhealthy lifestyles and destructive patterns of behavior; some come from dysfunctional family backgrounds; some have experienced emotional trauma and devastation. They come to us because they are determined to turn their lives around, to find new hope, new faith, a new beginning. And, quite frankly, when they do so, some of them have G-d on their minds.

These people choose Agudath Israel precisely because they know the type of organization we are. To be sure, they are in need of the social services we provide, but they also sense that they are in need of something else to put their lives in order, something spiritual—a reconnection with their Maker and with their Jewish faith. And while we are meticulous in ensuring that the social services we provide are entirely non-sectarian, we do try to accommodate those of our clients who are looking for religious counseling—by working with them after hours, by referring them to a rabbi or a Jewish education program, by facilitating their desire to come closer to their faith and their G-d.

Hence my third point: Countless Americans who are in need of social services are looking for something beyond merely material assistance. When they make the decision to turn their lives around, they will often seek out religious institutions to help them find their way back. While government ought not fund sectarian activities, at the same time government ought not exclude from the social service mix the very institutions to which many needy Americans are likely to turn for service precisely because of the added spiritual dimension those institutions are able to offer. So long as no government funds are used for religious activities, so long as no beneficiary is compelled to participate in religious activities, so long as the funded social services are entirely separable from the provider's religious activities, neither law nor logic can justify the exclusion of faith-based social service providers simply because they also make religious services available to their clients.

4. *Respecting the Religious Tenets and Identity of a Faith-Based Provider:* In the early 1980's, New York City Mayor Edward I. Koch promulgated "Executive Order 50," requiring all entities receiving city funds to pledge nondiscrimination on a variety of bases, including sexual orientation. At that time, Agudath Israel was slated to enter into a number of social service contracts with the city, including contracts that funded after-school activities for youths. We decided, however, that we could not accept the mayor's conditions; our rabbinic leadership insisted that organizational employees who serve in the positions of role models must embody the core values of traditional Judaism. We sued the mayor, as did the Salvation Army and the New York City Archdiocese, and we ultimately won—proving, I guess, that sometimes you can fight City Hall—but the bottom line is that we were all prepared to give up our city funding had Hizzoner's executive order been upheld.

There is a lesson to be learned from this incident as well. If government chooses to enlist religious groups to help address the nation's urgent social needs, for the reasons I have already suggested and others as well, it must do so in a manner that allows a faith-based organization to remain faithful to its base. To insist that a religious charity adopt secular nondiscrimination standards, for example, even where those standards conflict with religious doctrine, or to insist that religious symbols be removed from a faith-based provider's facilities, is simply a polite way to say that religious charities should not be eligible to receive funds. No self-respecting religious organization would ever trade in its sacred tenets for a pot of government lentils.

It is not my role here today to expound at length on the legal issues surrounding the right of a religious organization that receives government funding to maintain policies and practices that reflect its own religious tenets. Suffice it to note that there is ample authority under federal law that reflects Congress' longstanding view that receipt of federal funds does not require religious entities to abandon their religious identities.

Consider, for example, the law that excuses a health care facility that receives federal funding from making its facilities available or providing personnel for the performance of any sterilization procedure or abortion, if such activity would be contrary to the facility's religious beliefs. 42 U.S.C. sec. 300a-7(b). Or consider Title IX of the Education Amendments of 1972, which generally prohibits sex discrimination by schools that receive federal financial assistance, but explicitly exempts "an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." 20 U.S.C. sec. 1681 (a) (3). Clearly, government itself would not be permitted to discriminate on the basis of sex or restrict sterilization or abortion rights. But, as these two laws demonstrate, government is not thereby precluded from extending financial assistance to an entity whose religious tenets demand such discrimination or restriction—and the entity, in turn, is not required to abandon its faith as a precondition to receiving the assistance.

To be sure, there may exist religious organizations whose principles or policies are so far removed from the American mainstream that they ought not be eligible for federal funding under the charitable choice program. Public support should not be extended to any group, including any faith-based group, that preaches racial hatred or religious terrorism, for example. But, as the famous Bob Jones case makes clear, the law is already experienced in drawing the line between, on the one hand, groups whose positions are so repugnant to our shared democratic values as to render them ineligible for public support through tax exemption; and, on the other hand, more mainstream religious bodies whose tenets may diverge from the norms of secular society but are nonetheless deemed charitable entities eligible for public support through tax exemption. *Bob Jones University* v. *United States*, 461 U.S. 574 (1983).

That line-drawing exercise, difficult though it may occasionally be, has served our nation well; it can and should be employed in the charitable choice context as well.

I make this point, frankly, with some degree of trepidation. A religious group, or a religious practice, that is considered mainstream today may be considered beyond the American pale tomorrow, as the Supreme Court noted in *Bob Jones* itself, 461 U.S. at 574. And as our society in general moves toward greater egalitarianism, there is danger—a term I use advisedly—that religious communities that envision different roles for male and female, or that regard certain types of conduct or lifestyle as immoral or sinful, or that embrace any set of values at variance with those of the broader secular society, will no longer be able to participate fully in American life, their beliefs and traditions steamrolled in the noble name of civil rights.

The genius of America has been its ability to strike the appropriate balance between the sometimes competing values of promoting equality and respecting diversity. Insisting that all faith-based providers sacrifice their religious principles and practices as the price they must pay if they wish to service the needy with government funds would upset that delicate balance and do violence to the foundation block of religious freedom upon which our society has been built. That is why Agudath Israel strongly supports the provision in the existing charitable choice laws, and in the proposed expansion of those laws, that allows religious charities to retain their identities and policies. In our view, this must remain an indispensable feature of any such legislation.

Thank you.

Senator SCHUMER. Thank you, Rabbi Zwiebel.

Our next witness is Reverend Eliezer Valentin-Castañon.

STATEMENT OF REVEREND ELIEZER VALENTIN-CASTAÑON, PROGRAM DIRECTOR, GENERAL BOARD OF CHURCH AND SOCIETY, UNITED METHODIST CHURCH, WASHINGTON, DC

Reverend VALENTIN-CASTAÑON. Thank you, Mr. Chairman. I am shortening my testimony, but I would like to request that my entire testimony be printed in the record.

Senator SCHUMER. Without objection, everyone's entire testimony will be part of the record.

Reverend VALENTIN-CASTAÑON. Thank you.

I would like to thank you again for this opportunity to speak to you on a matter as important as serving the need. We welcome the great attention that Congress and the administration have given to religion in the public square, and for the recognition of the great work that we do for the marginalized and needy in our communities.

We are grateful for the recognition that we have not only been the conscience of the Nation, but also the ones to help carry the burdens of the poor and the unwanted. We thank you for the recognition that religious organizations to contribute to this country not only with prayers, but with sweat and blood.

I am Eliezer Valentin-Castañon. I am a program director of the General Board of Church and Society, United Methodist Church, and I am also an ordained minister of our church who works on church-state issues for the denomination. As part of my responsibilities with the Methodist Church, I work on a variety of issues that are affected by charitable choice.

The United Methodist Church has charged the General Board of Church and Society with the "responsibility...to seek the implementation of the social principles and other policy statements of the General Conference on Christian Social concerns." It is because of this charge that I come to you today to speak on behalf of the General Board of Church and Society on the issue of charitable choice.

The United Methodist Church has not adopted language regarding charitable choice. Nevertheless, our General Conference has been very clear about what the church understands is appropriate when a church is seeking to enter into a partnership with the state in order to offer community services.

In the Book of Resolutions of the church, our church has stated that, "Governmental provision of material support for church-related agencies inevitably raises important questions of religious establishment. In recognition, however, that some health, education, and welfare agencies have been founded by churches without regard to religious proselytizing, we consider that such agencies may, under certain circumstances, be proper channels for public programs in these fields. When government provides support for programs administered by private agencies, it has the most serious obligation to establish and enforce standards guaranteeing the equitable administration of such programs and the accountability of such agencies to the public authority."

We believe that no private agency, because of its religious affiliation, ought to be exempted from any of the requirements of such standards. In particular, our church believes that Government resources should not be provided to any church-related agency unless it meets the following minimum criteria.

First, the services of the agency shall be the designed and administered in such a way as to avoid serving a sectarian purpose or interest. The services to be provided by the agency shall be available to all persons, without regard to race, color, national origin, creed, or political persuasion. Skill, competence, and integrity in the performance of duties shall be the principal considerations in the employment of personnel and shall not be superseded by any requirement of religious affiliation.

This, Mr. Chairman, has been the position of our church concerning the relationship between church and state to this day. As you can see, the United Methodist Church does support partnership between church and state. As a matter of fact, our church has been in partnership with the state in many different ventures, providing non-sectarian and non-proselytizing social and educational services in our community, never losing sight of our faith and our commitment to serve Christ.

From the following examples—and I am not going to read them all because there are too many and too lengthy, but let me just mention some of the names: the Chollas View Workfirst Center, in San Diego, California; Southside Employment Coalition, in St. Louis, Missouri; Family Pathfinders, in Smiley, Texas; Louisville Works and Kairos Business Services, in Louisville, Kentucky. All of them have been working in partnership with the state offering services to the community.

The United Methodist Church has no difficulty in partnering with government to do what is right for people in need. The above examples show that we have been doing it for many years, and very successfully. Nevertheless, the United Methodist Church's practice of setting up separate, non-profit corporations for such organizations that want to provide these services to the community clashes directly with the main provisions of charitable choice.

The United Methodist Church cannot support legislation that clearly endorses religious discrimination in the hiring and firing practices of community social services ministries paid for by Federal Government dollars. Our church believes that programs serving the community and funded with Federal and State dollars should not be allowed to use faith to discriminate.

The preservation of the church's character so strongly argued by the supporters of this legislation cannot be upheld by sacrificing civil rights that we all have struggled so hard to defend. Integrity and skill should be the reasons for hiring and firing people from government jobs, not their faith affiliation.

[The prepared statement of Reverend Valentin-Castañon follows:]

STATEMENT OF REV. ELIEZER VALENTIN-CASTAÑON, GENERAL BOARD OF CHURCH AND SOCIETY, UNITED METHODIST CHURCH

INTRODUCTION

Thank you, Mr. Chairman and Members of the Committee, for this opportunity to speak to you on a matter as important as serving the needy. We welcome the great attention that Congress and the administration have given to religion in the public square and for the recognition of the great work that we do for the marginalized and needy in our communities. We are grateful for the recognition that we have not only been the conscience of the nation but also the ones to help carry the burdens of the poor and the unwanted. We thank you for the recognition that religious organizations do contribute to this country not only with prayers but with sweat and blood.

I am Eliezer Valentin-Castañon, a Program Director of the General Board of Church and Society (GBCS) of The United Methodist Church. I am also an ordained minister of our Church, who works for the church on issues of Church-Government relations. Part of my responsibilities with The United Methodist Church is to work in a variety of issues that in one way or another are affected by Charitable Choice (i.e., TANF, Welfareto-work, etc.)

The United Methodist Church has charged the GBCS with the "responsibility. . . to seek the implementation of the Social Principles and other policy statements of the General Conference on Christian Social concerns." In addition, GBCS "shall speak its convictions, interpretations and concerns to the Church and to the world." [1]

It is because of this charge that I come to you today to speak on behalf of the GBCS on the issue of Charitable Choice.[2] The United Methodist Church has not adopted language regarding Charitable Choice. Nevertheless, our General Conference[3] has been very clear about what the Church understands is appropriate when a church is seeking to enter in a partnership with the State in order to offer community social services (i.e., Drug rehabilitation). In the Book of Resolutions of The United Methodist Church 2000, our Church has stated that:

> "Governmental provision of material support for church-related agencies inevitably raises important questions of religious establishment. In recognition, however, that some health, education, and welfare agencies have been founded by churches without regard to religious proselytizing, we consider that such agencies may, under certain circumstances, be proper channels for public programs in these fields. When government provides support for programs administered by private agencies, it has the most serious obligation to establish and enforce standards guaranteeing the equitable administration of such programs and the accountability of such agencies to the public authority."

We believe that no private agency, because of its religious affiliations, ought to be exempted from any of the requirements of such standards. In particular our

---

[1] The Book of Discipline of The United Methodist Church 2000. Pages 490–491.

[2] Neither I nor the GBCS has received a federal grant or contract in the current or preceding two fiscal years.

[3] The General Conference of The United Methodist Church is the highest legislative body of the church. This is the body that makes legal and theological decisions regrading the life of the church. General Conference meets every four years in different part of the country.

58

Church believes "that government resources should not be provided to any church-related agency unless it meets the following minimum criteria:

> 1. The services to be provided by the church-related agency shall meet a genuine community need;
> 2. The services of the agency shall be designed and administered in such a way as to avoid serving a sectarian purpose or interest;
> 3. The services to be provided by the agency shall be available to all persons without regard to race, color, national origin, creed, or political persuasion;
> 4. The services to be rendered by the agency shall be performed in accordance with accepted professional and administrative standards;
> 5. Skill, competence, and integrity in the performance of duties shall be the principal considerations in the employment of personnel and shall not be superseded by any requirement of religious affiliation. . ."

In addition, the Church believes:

> ". . .that churches have a moral obligation to challenge violations of the civil rights. . . and requirement of attendance at church activities in order to qualify for social services"

As you can see The United Methodist Church does support partnerships between church and state. As a matter of fact, our Church has been in partnership with the state in many different ventures, providing nonsectarian and non-proselytizing social and educational services in our communities, never losing sight of our faith or our commitment to serve Christ.

From the following examples you can see the breath of our Church's partnership with government in providing community social services.

UNITED METHODIST COMMUNITY MINISTRIES

CHOLLAS VIEW WORKFIRST CENTER AND SAN DIEGO YOUTH AT WORK[4]

Metro United Methodist Urban Ministries San Diego, California

Metro United Methodist Urban Ministries of San Diego is a 35-year-old organization described by its director, John Hughes, as a "faith-based incubator," and it has grown dramatically over the last several years since it began to more actively access public programs linked in large part to welfare reform and related federal measures. "Our mission is to help churches help people," according to Hughes. Metro is managing partner of the Chollas View Workfirst Center, housed at the Chollas View United Methodist Church in southeast San Diego, a predominantly Hispanic and African American neighborhood. It is a major player in San Diego Youth at Work, which provides job training, educational incentives and assistance with general life skills.

The Chollas View Workfirst Center, which has 14 other partners, developed initially because the church parking lot was used as a pick-up and drop-off point for persons in an early workfirst transportation sector (van driving) training program. It is now a multi-service program funded by U.S. Department of Labor money through a competitive process. The center provides vocational training, paid work experience, support services, childcare on site, transportation, employment readiness training, job placement and employment retention services. The Chollas View Church is itself a collaborating agency, as is All Congregations Together, an interfaith organization that primarily offers mentoring services to persons leaving welfare.

San Diego Youth at Work targets young people ages 14–21. It too is funded primarily by the federal Department of Labor and will likely last three, and perhaps five years, according to Hughes. It has three components: 1) matching talents with needed and available resources, such as finding out the interests and abilities of young people and finding the right program or educational opportunity to development abilities;. 2) Community coaches, who are from the community and help young people map their futures; 3) Support services, including food, clothing, rent, tires and other material needs. Much of these services are supplied by one of Metro's two Good Neighbor Centers.

Metro itself provides relatively few direct services. It is more of a broker, a builder of networks. At present, some 95 percent of Metro's budget comes from government sources, the other five percent from churches and private donations. What about religious content that might seem relevant in the public-funded programs? "We make it clear that we are faith-based, that we are part of the United Methodist Church. We do not limit services based on religion and we hire persons of many faiths or no faith, depending on their abilities. We do pray at meetings. We are a Christian organization. Our philosophy on this point is that of St. Francis: 'Preach the gospel at all times and, if necessary, use words."

---

[4] These examples are part of a United Methodist cross agency document, soon to be released, espousing the Church's position on Charitable Choice. This information was gather by Mr. Elliot Wright a community development consultant for the General Board of Global Ministries.

Hughes noted that Metro over the years has learned to "speak church and speak social service." He worries about new faith-based players that may not have both vocabularies and may lack the capacity to produce the results expected by government funders. Consequently, he and colleagues in San Diego are exploring the possibility of a local faith-based institute to identify and train strategic leaders and to develop the idea that some faith-based groups may best serve as brokers and legitimizers. Hughes foresees a growing need for an institute that could offer faith-based consultation and possibly build a pool of funds for faith-based social service providers.

FAMILY PATHFINDERS[5]

SMILEY UNITED METHODIST CHURCH, SMILEY, TEXAS

Volunteers within The United Methodist Church of Smiley, Texas, 60 miles east of San Antonio, were already helping people prepare for meaningful work before they learned about Texas Family Pathfinders, a state-initiated program that enlists and makes small grants to faith-based and community groups engaged in welfare-to-work. And the people at Smiley Church are still doing the work now that the state grant is gone. In fact, they did not reapply because, says Nelda Patterson, who spearheaded the ministry, "we just didn't have the money to keep taking state grants." A mystery? Not really. Reimbursements were notoriously slow and the small congregation-a 100 members church with an average Sunday attendance of 50- did not have the up front funds to carry the formal program.

It all started at Smiley like so many things churches do: Someone had a dream. In this case, it was Nelda Patteson who over a period of time had helped a young woman become a Licensed Practical Nurse (LPN). But the young nurse had a hard time keeping jobs, and Ms. Patteson figured that she "needed to get smarter about how to help people." She became certified to lead a program called "Survival Skills for Women," consisting of 10 sessions over five weeks. She offered the training to five women, mostly from a local housing project, coming off welfare. Things went well.

"About that time [1998] we learned that the state had some money for faith-based programs. We applied and received $10,000 to help nine TANF-certified women receive computer training and literacy education at a center in Gonzales, the county seat. We were one of five recipients out of 100 applicants at that time." The funds came through Family Pathfinders, a Texas effort to mobilize and encourage faith groups to get involved in welfare-to-work training and mentoring. In Smiley, the money went to pay for the computer course and child care in Gonzales and for travel back and forth. Volunteers led the "Survival Skills for Women" course at the church. The results were positive on all counts, including the relationships established with the women coming off welfare.

The church realized no money from the program and that was not a problem. "We liked what the money went for," said Ms. Patteson, "but the state was so slow in paying the reimbursement that we couldn't continue. As it was, we had to borrow $1,500 from the local United Methodist Women to pay the initial tuition, child care and travel costs. That was paid back when the check arrived."

Ms. Patteson and others at the Smiley church stay in touch with the women who went through the program. They have also offered to share the techniques of their success with other churches in the region. "Maybe a larger congregation would have the funds to tide it over," Ms. Patteson said.

The growth of the congregation's awareness of poverty and the people caught in it is an important outcome of the temporary partnership with a government program, according to Ms. Patterson. "Before, some people in the church thought anyone who lived in a housing project was just lazy. Now they know that's not so. There is more caring about persons now."

---

[5] Martha Ward, director of Family Pathfinders, reports that across the state of Texas more United Methodist congregations are involved in the program than of any other denomination.

LOUISVILLE WORKS AND KAIROS BUSINESS SERVICES

WESLEY HOUSE COMMUNITY SERVICES, LOUISVILLE, KENTUCKY

Wesley House Community Services has leveraged a grant from Emerging Ministries with Women, Children and Families (funded by the Women's Division) into ongoing public funding for two programs that help women leaving welfare to build solid lives. Louisville Works, a computer training program, and Kairos Business Services, an internship program, do prepare persons for work in offices, but the objectives are bigger.

Getting the students into "just any jobs" so that they leave the welfare roles is not enough, according to Katie Chapman, director of the two programs. The two programs aim at equipping participants to deal with the ups and down of real life and to feel a sense of security in knowing that Wesley House is there should they need a safe, caring place. Wesley House is a United Methodist national mission institution (linked to the General Board of Global Ministries) with programs in childhood, youth and family and senior services.

Since the Women's Division seed grant was received in 1997, Louisville Works and Kairos have trained a total of 200 persons, with much of the current funding coming through the Kentucky version of Temporary Assistance for Needy Families (TANF). State government reimbursed Wesley for student tuition. Other funding comes from church and other private sources. Kairos is an eight-week internship that goes beyond basic computer training. Case management for students in each program is provided by the Jefferson County social service agency. One measure of the success at Wesley is the fact that the computer instructor in the Spring, 2001 was a single mother of four who was herself a graduate of Louisville Works and of Kairos. Her ability to identify and communicate with the students is seen as a major reason attendance is excellent in the classes.

NEAR SOUTHSIDE EMPLOYMENT COALITION AND YOUTH OPPORTUNITY PROGRAM

KINGDOM HOUSE, ST. LOUIS, MISSOURI

Kingdom House is a 99-year-old community center of the Missouri East Annual Conference with a long history of partnerships with government and private agencies. It is a major sponsor of and until recently housed the Near Southside Employment Coalition, an ecumenical program whose director is actually paid by Kingdom House. Near Southside serves an area south of downtown St. Louis filled with a mixture of public housing and "gentrified" residences. Almost all of the public housing residents are African-American; many single women heads of households. Near Southside's workforce development programs was 15 years old and had a good track record, and then came welfare-towork. The employment coalition entered into a performance-based contract with the state to provide job training services to 75 persons. The experience was less than a happy one, according to Near Southside director William McRoberts. Relatively few persons were initially referred to the agency and, says McRoberts, the training period was too short, the procedures unclear and the bureaucracy heavy-handed. McRoberts says that his agency did not "staff up" at the outset, that is, hire additional people, so that Near Southside did not lose as much money as did some non-profits with TANF contracts in the early days of welfare reform. The state was reimbursing services providers at $1,800 per individual, while the actual cost was closer to $4,500 per person, according to McRoberts.

Near Southside did not reapply for a direct state contract but it did sign on to a pilot project funded by a combination of state and private foundation money. The pilot involves training persons to work in customer services, primarily through "call centers," a growing field that pays $9 or $10 per hour. The funding partners are the Annie E. Casey Foundation, through its Jobs Partnership Program, and the Missouri State Department of Social Service Block Grants. Near Southside provides customer services and job readiness training and computer literacy courses. Kingdom House in 1997 was certified to receive Youth Opportunity Program (YOP) tax credits from the state of Missouri. Under this arrangement, individuals and corporations who give money to YOP at Kingdom House receive a 50 percent credit on their state income taxes. YOP is a social development program for low income, "at risk" youth. It provides recreational and other after school activities. Since 1997, Kingdom House has received $1 million through the tax credit plan, according to Ralph Lewis, director of development.

Transitional Journey Program

COOKMAN UNITED METHODIST CHURCH, PHILADELPHIA, PENNSYLVANIA

The Transitional Journey Program of the Cookman United Methodist Church in Philadelphia is, according to a University of Pennsylvania research report, the only real charitable choice venture in the state; indeed, it is one of very few in the whole country. It got underway in 1998 with a $150,000 state allocation for welfare-towork training, placement and follow-up. For the first year, the money was in the form of a performancebased contact and some of the staff members were not paid for months while Cookman waited for reimbursement We worked on hope and despair," says the Rev. Donna Jones, pastor of the smallmembership congregation in poverty-ridden North Philadelphia. The second year was easier because part of the money was a grant and, also, additional funding came from local and national United Methodist agencies.

Cookman worked with 192 persons leaving welfare in the first three years of Transitional Journey, which has a job placement rate of 87 percent and an overall retention rate of 60 percent, which is quite high. Some of the program graduates change jobs in the first year but are counted as working if the break is short. "People quit or get fired and come back to our doorstep, and we help them find another job," says Pastor Jones. The program has a small staff of case workers. It has received some in-kind contributions, including computer and other equipment from the Dupont Corporation.

Most of the program participants are women and 80 percent have no high school diplomas. Transitional Journey offers a GED program and training in English as a second language. Counseling is offered and children of the women are invited to take part in the church's activities for children and youth, including recreation.

As a charitable choice contractor, Transitional Journey includes religious content in its training, however, it must use non-government funds to buy the Bibles it distributes to persons who want them. Pastor Jones recalls that during the first year one student called the state to complain of "too much" religious content. "That's why we have all the students sign waivers, so that they know that our program is Christ-centered, but the religious part of it is strictly voluntary." For example, a Muslim who came through the program excused herself from the sessions of faith and selfhood. "Sisters of Faith," a related program encourages a deeper faith commitment and builds skills to "live faith daily."

The initial state grant was wrapped up in March, 2001, with a second application pending, expected to become effective in June, 2001.

What are the problems with Charitable Choice?

The United Methodist Church has no difficulty in partnering with government to do what is right for people in need. The above examples show that we have been doing this for many years and very successfully. Nevertheless, The United Methodist Church's practice of setting up separate nonprofit corporations for church organizations that want to provide these services to the community clashes directly with one of the main provisions of Charitable Choice.

We do not have any difficulty with the government providing access to religiously motivated organizations (i.e., separate non-profit religiously affiliated corporations) to compete for federal dollars. We cannot agree, however, in the establishment of 'faith "as a separate category that sets religious groups apart from requirements which others are obligated to meet in order to provide social services.

When President George W. Bush said that he intended to "[b]ring faith organizations to the table and [to] remove legal barriers to full participation in public programs and access to public program funds," we were troubled. When he said that "Private and charitable groups, including religious ones, should have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes. . .," we were cautious.

We believe, however, that the key point in President's Bush statement is that private and charitable groups "should have the fullest opportunity permitted by law to compete." Thus, we should use what is permitted by law, we should use what we know has worked and improve on it, rather than to create a new program that, in our opinion, is a solution looking for a problem.

The United Methodist Church cannot support legislation that clearly endorses religious discrimination in the hiring and firing practices in community social service ministries paid by the Federal government. Our Church believes that programs serving the community and funded with federal or state dollars should not be allowed to use faith to discriminate. The preservation of the Church's character, so strongly argued by the supporters of this legislation, cannot be upheld by sacrificing civil rights that we all have struggled so hard to defend. Integrity and skills should be the reasons for hiring or firing people from a government-paid job, not their faith affiliation. We believe that our actions are the loudest witnesses we can present to the world to show the love of God through Christ.

The United Methodist Church is a strong supporter of Title VII, Section 702 (a), of the Civil Rights Act of 1964, which allows for religious discrimination on the basis of a religious group's doctrines and rules. We can accept this discrimination as long as the discrimination takes place in church-related ministries and where the ministry is paid by their own members. We cannot agree, nor support, religious groups' discrimination while using tax dollars. It is one thing for the church to require that their pastors, organists, sextons, and other employees of the church to be from their faith and conviction, another thing, entirely different, is for religious groups receiving tax dollars, in order to provide secular services, to be allowed to use the same criteria for hiring their employees for government related programs. Therefore, in our estimate, violating civil right laws using federal dollars.

In addition, we must pay heed to Justice Rehnquist is warning regarding government funding of religious organizations: "There is the risk that direct government funding, even if it is designated for specific secular purposes, may nonetheless advance the pervasively sectarian institution's 'religious mission." As long as government attempts to separate what is religious from secular in entities like churches, synagogues, mosques, etc, it risks becoming excessively entangled with religion, thus advancing it or hindering religion, both clear violations of the establishment clause.

CONCLUSION

Charitable Choice clearly contradicts the minimum requirements set forth by our church as to what must be in place before a religious group accepts tax dollars in order to provide social services. We believe that Charitable Choice is not the right way to help the needy nor is it the best way to foment healthy Church-Government relations. Let me list for you five areas were we disagree with this policy.

1. It steps across the boundary of church-state separation by exempting "Faith-Based" groups (used here to refer exclusively to "religiously sectarian groups," since "Faith-Based" groups are more broadly defined) from compliance with civil rights laws barring hiring discrimination on religious grounds with tax dollars, or by not requiring separate incorporation of contract holders, thus allowing local churches to receive funding directly into their accounts, and by allowing religious content in service programs.
2. This relationship may result in excessive religious reliance on public money, leading to a weakening of the role of a religious group's prophetic voice. How can a prophet raise his/her voice against government policies while simultaneously asking for government help?
3. Since government funding brings government oversight through compliance reviews and audits. This government review will lead to government interference in the internal affairs of religious groups.
4. Elected officials will be tempted to play politics with religion (which we have seen already happening in some states). Houses of worship may compete against one another for government contracts, encouraging rivalry among religious groups who are looking to access the same pot of money. Who will decide which religious group is better suited to provide services? Or which services are more worthy? This situation could widen the divisions that are present in today's religious landscape in America, driving us further apart.
5. In the area of drug rehabilitation, we find that the line that separates Church and State is completely crossed over. No one can honestly believe that a program funded with tax dollars, which requires as a major component of treatment the acceptance of Jesus Christ as Lord and Savior, will not advance religion. How can this scenario be considered as not advancing religion when this requirement is exactly what we find in the Gospel of St. Matthew as one of the responsibilities of believers? "Go to the people of all nations and make them my disciples" (28:19).

For Christians, under this circumstance, more clearly than any other, tax dollars will clearly go to advance a religious purpose.

This is not an exhaustive list of our concerns regarding Charitable Choice, but reflects some of the major difficulties we have with this policy.

We agree with the Baptist Joint Committee and other religious groups that there are alternative options where religious groups are involve in providing services to the community in partnership with the State. We believe that there are alternatives to continue and expand church-state partnerships without bringing down the wall of separation between church and state, which has protected and enhanced our religious liberties and American democracy. Therefore, we would like to recommend the following so that we might continue the partnership and to further enhance it.

First, let religious groups create separate affiliate (non-profit) corporations that are not "pervasively sectarian," with technical assistance from the federal government (something that HUD has been doing). This will enable faith based organizations to receive government money and perform the services with religious motivation, but without proselytizing, discrimination, or teaching religion.

Second, encourage increased private giving by passing legislation expanding deductibility rules for charitable contributions. This money could be directed by individuals to the charities of their choice with no regulatory strings attached.

Third, foster cooperation between religious groups and government that do not involve taxpayer's dollars. Government could publicize the good work that private religious and other non-profit social service groups are doing and make referrals to these organizations when needed and appropriate. Churches and government have been working together for many years; this can continue and be expanded without sacrificing each others' freedom.

Fourth, churches could also work in partnership with the State in providing volunteers in governmentorganized mentoring projects, as long as government does not promote religion.[6]

Let me conclude with the words of Dr. Martin Luther King, Jr., regarding the relationship between the Church's prophetic voice and the State.

> The church must be reminded that it is not the master or the servant of the state, but rather the conscience of the state. It must be the guide and the critic of the state, and never its tool.[7]

Thank you for your attention.

Senator SCHUMER. Thank you very much, Reverend.

Now, we will have Mr. Edward Morgan, of the Christian Herald Association.

STATEMENT OF EDWARD MORGAN, PRESIDENT, CHRISTIAN HERALD ASSOCIATION, NEW YORK, NEW YORK

Mr. MORGAN. Thank you, Senator Schumer.

My name is Edward Morgan and I am President of Christian Herald Association, a 122-year-old faith-based charity in New York City. We operate the historic Bowery Mission on Manhattan's Lower East Side, which is one hundred-percent privately supported.

We also operate a 77-bed program publicly funded by the City Department of Homeless Services, the Nation's largest, called the Bowery Mission Transitional Center. BMTC is the highest-performing substance abuse center in the City of New York.

Finally, we also operate one of New York's major summer camps for at-risk inner-city children, plus after-school programs in six locations. I believe each of these three programs relates to the charitable choice issue before the Committee today.

The Bowery Mission is a traditional faith-based program which relies solely on private funding. Here, faith-based activities are a daily component of the services we deliver, and we consider this program inappropriate for public funding.

On the other hand, the Bowery Mission Transitional Center is a custom-designed partnership between government and provider, held in a separate 501(c)(3) corporation. In this arrangement, no religious activities are required of our clients and our programming does not promote our faith.

---

[6] See for additional ideas and suggestions "In Good Faith: A Dialogue on Government Funding of Faith Based Social Services." The Feistein Center for American Jewish History, Temple University, Philadelphia, PA.

[7] King, Jr., Martin Luther. Strength to Love. 1963.

The charitable choice issue at BMTC revolves around the current legal hurdles to freely hiring people of faith. The not-so-secret ingredient in our successful program is employees of faith who have reached the bottom themselves and found that a power higher than themselves is their only hope, and that the real meaning of life is reaching out to other people with unconditional love and earning their trust and seeing them triumph over adversity as well.

Does having exclusively people of faith on the staff of our publicly-financed project mean we are promoting religious with government funds? No. Absolutely no religious activities are required. Does it mean, however, that clients might catch this communicable disease called faith from staffers because it is attractive? Absolutely.

Since the Bowery Mission Transitional Center opened in January of 1994, over 700 men have graduated and moved from public dependence in city shelters to achieve independent, productive lives, at a cost to the city of less than $15,000 per graduate. Ninety-five percent of them have not returned to the city shelter system 1 year later—living proof that partnerships between government and faith-based charities can achieve superior results.

Our belief that the success and the integrity of our services depends on our freedom to hire men and women of faith is reflected in the current inability of our children's organization, Kids With A Promise, to collect a $600,000 grant from the Office of Juvenile Justice and Delinquency Prevention because of existing restrictions and assurances in hiring. As with the Bowery Mission Transitional Center, Kids With A Promise's programs are effective precisely because they are delivered by people who demonstrate the compassion and commitment to others that comes with their faith.

I thank the Committee for a chance to be heard, and I believe such programs such as the Bowery Mission Transitional Center represent the future of charitable partnerships in our city and in this country. By combining the resources of government with the compassion, hope and vision offered by faith-based programs, together we can provide men, women and children with the most effective care this country has to offer.

Thank you.

[The prepared statement of Mr. Morgan follows:]

STATEMENT OF EDWARD MORGAN, PRESIDENT, CHRISTIAN HERALD ASSOCIATION, NEW YORK, NEW YORK

My name is Edward Morgan and I'm President of Christian Herald Association, a 122 year old faith-based charity in New York. We operate the historic Bowery Mission on Manhattan's Lower East Side, which is 100% privately supported. We also operate a 77 bed program funded by the City Department of Homeless Services, called The Bowery Mission Transitional Center. BMTC is the highest performing substance abuse shelter in the City. And finally, we also operate one of New York's major summer camps for at-risk inner-city children, currently in its 107th year plus after-school programs in six locations. Each of these three programs relates to a charitable choice issue before the Committee today, I believe.

At the Christian Herald, we run two types of adult transitional programs. The first, represented by the Bowery Mission is a traditional faith-based program which relies solely on private funding. Here, faith-based activities are part of every day's schedule and are a crucial component of the services we deliver.

The second type of program is represented by the Bowery Mission Transitional Center—a custom designed partnership between government and provider held in a separate 501 (C)–3 corporation. In this arrangement, no religious activities are required of our clients, and our programming does not promote our faith. The charitable choice issue at BMTC revolves around the current legal hurdles to freely hiring people of faith. The not-so-secret ingredient in this successful program is employees of faith who have reached the bottom themselves and found, as countless others have through history, that a power higher than themselves is their only hope— that the real meaning of life is reaching out to other people with unconditional love, earning their trust and seeing them triumph over adversity as well. Although they do not proselytize, they are open about their faith, and will freely share their beliefs with any client who expresses interest.

Since the Bowery Mission Transitional Center opened in January of 1994, over 700 men have graduated and moved from public dependence in city shelters to achieve independent productive lives at a cost of less than $15,000 per graduate. Ninety five percent have not returned to the city shelter system one year later. We are the most successful substance-abuse shelter in New York City—living proof that partnerships between the government and faith-based charities can achieve superior results to secular organizations without infringing on the separation between church and state or diluting our religious heritage, provided that we are free to hire staff based on their religious preference.

Our belief that the success and the integrity of our services depends on our unrestricted ability to hire men and women of faith is reflected in the recent decision of our children's organization, Kids With A Promise, to turn down a $600,000 grant from the Office of Juvenile Justice and Delinquency Prevention, funding that would severely inhibit our hiring people of faith. As with the Bowery Mission Transitional Center, Kids With A Promise's programs are effective precisely because they're delivered by people who demonstrate the compassion and commitment to others that comes with their faith.

I thank the Committee for a chance to be heard. I believe programs such as The Bowery Mission Transitional Center represent the future of charitable services in this country. By combining the resources of the government with the compassion, hope, and vision offered by faith-based programs, we can together provide men, women, and children with the most effective care this country has to offer.

Thank you.

Senator SCHUMER. Thank you very much, Mr. Morgan, another fine New Yorker of a somewhat different view than our previous New Yorker.

I would also like to welcome Congresswoman Carolyn Kilpatrick, of the 15th District of Michigan. She came here specifically to welcome Dr. Adams, who is her constituent.

Thank you for coming, Congresswoman.

Our next witness is Mr. John Avery, Director of Government Relations for NAADAC, the association for addiction professionals.

STATEMENT OF JOHN L. AVERY, GOVERNMENT RELATIONS DIRECTOR, NATIONAL ASSOCIATION OF ALCOHOLISM AND DRUG ABUSE COUNSELORS, ALEXANDRIA, VIRGINIA

Mr. AVERY. Thank you, Senator Schumer and members of the Committee. We would like to commend you for considering Senate 304, which is an important piece of legislation regarding the demand reduction strategy of drug addiction in our Nation.

We represent addiction professionals, counselors, on the front line of treatment. For the past 30 years, we have advocated quality, standardized, improved, research-based, effective care. NAADAC welcomes and supports any organization, faith-based or secular, that wants to provide quality treatment. We feel that more treaters in the field is a good thing.

But our concern is not with who provides the care, but rather by what clinical standards that care is provided. We support the application of science-based, evidence-based best practices. Drug addiction is a chronic illness and it requires an individualized assessment and comprehensive treatment over a period of time, and that treatment may also involve medical and/or psychiatric components. It is essential that a treatment plan evolve based on the needs and progress of the clients, and that assessment must be provided by a competent professional to do so.

Our official position statement is attached; you have it for your reference. There are just a couple of points I would like to address.

Number one, addiction treatment is a public health service, not a social service. Secondly, 19 States now license individual addiction clinicians, and 31 States have other forms of certification. These licensure and certification provisions provide public health and safety criteria and consumer protection standards, as well as accountability.

Thirdly, we believe that no provider of a public health service should be permitted to discriminate in employment. The provision that an alternative be provided in a reasonable period of time, in reality, is not practical because of the treatment gap. Often, at a moment in time when a person needs services there may be no other alternative.

Chemical dependency is a stigmatized illness, and the treatment gap itself is the most glaring example of this. In any given year, 13 million Americans might need treatment, and yet only 3 million Americans will receive care.

The cost of illicit drugs alone is $116.9 billion to society. Combine that with alcoholism and it is $294 billion. Yet, for treatment, we provide $5.5 billion for drug addiction alone, and $11.9 billion if you combine it with alcoholism. In other words, America pays 25 times for addiction what it spends on treatment.

NIDA Director Alan Leshner has said that addiction is a brain disease and that this medical condition requires formal treatment. We often confuse individual behavior with the disease. While an individual's behavior may be illegal, sometimes criminal, and frequently obnoxious, we would not deny competent medical treatment to a person, say, for coronary illness or any other life-threatening illness because we didn't approve of their behavior. Addiction is a brain disease and ought not to be stigmatized as sin or willful misconduct or immoralism.

The current understanding of the Establishment Clause of the Constitution requires that faith-based organizations provide treatment in a secular atmosphere. There is a long history in our country of agencies doing this. So our question is why do we need new law? The mechanisms for new providers to enter the field already exist.

We also believe that an overtly religious atmosphere which suggests, even if not stated, that treatment is somehow contingent on religious belief or practice is essentially implied coercion. Such coercion is in violation of the patient's civil rights. It is also in violation of the ethical code which most professionals practice.

We welcome faith-based organizations who wish to provide treatment under current law, and we don't want to confuse professionally competent treatment with the adjunctive and supportive role that religious organizations play in the community. There is a strong role for spirituality and religious affiliation, freely chosen by the individual.

Thank you.

[The prepared statement of Mr. Avery follows:]

STATEMENT OF JOHN L. AVERY, LICSW, MPA, GOVERNMENT RELATIONS DIRECTOR, NATIONAL ASSOCIATION OF ALCOHOLISM AND DRUG ABUSE COUNSELORS, ALEXANDRIA, VIRGINIA

Mr. Chairman, Ranking Member, members of the committee. Thank you for the opportunity to appear before you today. NAADAC represents 13,000 licensed or certified addiction counselors from across the United States. Our membership reflects a multi-disciplinary range of professional, clinical and academic preparation. Our common denominator is that we are all chemical dependency counselors, clinical specialists in addiction, serving on the frontlines of chemical dependency treatment. We have for the past thirty years advocated for the development and deployment of the highest standards of care for patients seeking treatment for addiction to alcohol and other drugs.

NAADAC welcomes and supports any organization, faith-based or secular, committed to providing quality treatment and care to persons afflicted with drug addiction. The need is great. The treatment gap is wide. The number of treatment providers across the nation is declining. More providers and funding should result in increased access and availability of treatment. This is a good thing given the public health crisis addiction poses to our nation.

NAADAC's concern is not with who provides care, but rather by what clinical standards that care is provided. We are committed to the application of science based, best practices, perhaps as most succinctly stated in the National Institute on Drug Abuse (NIDA) publication *Principles of Drug Addiction Treatment, a Research-based Guide* (NIH ~004180, October, 1999). Addiction is a chronic, complex illness requiring individualized assessment and treatment. Such care should be comprehensive and should extend over a sustained period of time. Treatment may include episodes of medical and/or psychiatric care. As drug addiction impairs social functioning, social service interventions may be indicated as well. The essential element is that treatment plans continually evolve based on the individual needs and progress of the patient. The treater needs to be competent to provide such care.

The NAADAC position statement on what is often called "charitable choice" identifies six principles that we believe should inform your deliberations. This statement was sent to all members of the 107th Congress and key persons in the administration. A copy is attached for your reference.

The six principles are:

1. *There is no wrong door to treatment.* Specific populations have distinct addiction treatment needs. We support faith-based providers who comply with current state regulations governing substance abuse treatment.
2. *Addiction treatment delivered in the public sector is and should continue to be a public health service.* Regulations and guidelines to insure consumer protection and safety must be maintained.
3. *Charitable choice provisions must support state requirements.* Nineteen states now license individual addiction treatment providers. The other thirty-one states have some other form of certification or credentialing process. These public health and safety criteria provide consumer protection and accountability in addiction treatment.
4. *Charitable choice provisions must not undermine the Civil Rights Act prohibition on discriminatory hiring practices.* We believe that federally funded, public health clinical service providers should not discriminate in employment practices.
5. *Requirements to provide secular treatment alternatives "within a reasonable time period" are often unattainable.* Addiction treatment is provided in the context of a window of opportunity when the patient is sufficiently ill or desperate to seek help. The patient's acute medical need for detoxification, often life threatening, does not allow for delay. The lack of availability of treatment services in many communities renders this provision impractical.
6. *Taxpayers expect all federally funded programs to comply with stringent accountability and outcome measurement standards.* All providers should be held to the same federal standards that safeguard the public treasury.

Chemical dependency is a highly stigmatized illness. There is a profound disconnect between what science and research indicates regarding this disease and public opinion. The most glaring evidence of this misunderstanding is the treatment gap. In any given year there are between 13 and 16 million chemically dependent Americans in need of treatment, but only 3 million receive care. (SAMHSA,1999; Institute of Medicine, 1997.)

Recently released CSAT research indicates that in 1997 the social cost of illicit drug addiction alone is $116.9 billion When combined with alcoholism the social cost rises to $294 billion. In contrast expenditures for treatment are $5.5 billion for drug addiction alone and $11.9 million when combined with alcoholism treatment. Substance abuse costs America 25 times what the nation spends on treatment. (Coffey et al. *National Estimates of Expenditures for Substance Abuse Treatment*, 1997. SAMHSA Publication No. SMA-01-3511, February 2001.)

NIDA director Alan Leshner summarizes what scientific research has taught us about drug abuse: ". . .addiction is a brain disease that develops over time as a result of the initial voluntary behavior of using drugs. The consequence is virtually uncontrollable compulsive drug craving, seeking, and use that interferes with, if not destroys, and individual's functioning in the family and in society. This medical condition demands formal treatment." (Leshner, A.L., Ph.D., Addiction is a Brain Disease, *Issues in Science and Technology*. VOl.XVII, Num.3, The University of Texas at Dallas, Spring 2001)

Treatment delayed is effectively treatment denied. Access to care in real time is critical by the very nature of the illness. As a brain disorder it requires qualified professional care. The salient issue is the clinical competency of the treatment provider.

We often confuse the manifestation of the illness, the individual behaviors of the addict with the disease itself. That is what we see and experience. These behaviors are often illegal, sometimes criminal, and frequently obnoxious. Yet we would not deny competent medical treatment to a person with coronary disease or any other life threatening ailment on the basis of how we judge their behavior. Medical care would be provided and their behaviors dealt with in other settings. Addiction is a brain disease and must not be stigmatized as sin, willful misconduct, or immoralism.

It is not clear to us what problem Title VII seeks to address. Section 701.(a) page 132 lines 20–21 states "the program is implemented in a manner consistent with the Establishment Clause of the first amendment of the Constitution." Section 701. (K) page 138 lines 3–5 states ". . .shall be based on a program shown to be efficacious and should incorporate research based principles of effective substance abuse treatment." So why the need for new law? The mechanisms for new treatment providers to enter the field already exist.

Current understanding of the Establishment Clause of the Constitution requires that faith-based organizations provide treatment in a secular atmosphere. There is a long tradition of faith-based organizations of many denominations providing chemical dependency services in accordance with current federal, state, and local law. Catholic Charities, the Salvation Army, and Volunteers of America to name but a few. We believe that a sectarian, doctrinal or overtly religious atmosphere that suggests, even if not stated, that treatment or recovery is somehow contingent on adherence to certain religious practices and beliefs, is not compatible with quality care. The patient presenting for addiction treatment is very vulnerable to subtle and implied coercion. As other treatment options may not exist in real time, the presenting patient may comply in order to continue to receive services. Such coercion would be a violation of the patient's civil rights. It is also a violation of the ethical code of all human service professional associations.

We welcome faith-based organizations seeking to provide addiction treatment under current law. There is a crying need for more providers if the treatment gap is to be narrowed and eventually closed. We should not, however, confuse professionally competent clinical addiction treatment with the vital adjunctive role community based resources play in reintegrating the newly recovering individual into society.

There is a strong role for spirituality and freely chosen congregational or denominational affiliation in the lives of individuals and families. Indeed in the recovering community there is a long tradition of participation in Twelve Step groups. It is noteworthy that the Twelve Step tradition leaves all questions of doctrine, practice, and affiliation to individual determination and conscience.

NAADAC believes that it is the individualized treatment plan, based on the assessment by skilled trained professionals, that is the cornerstone of effective treatment. We strongly believe that expanded treatment opportunities will have a vital impact on the nation's demand reduction strategy.

Senator SCHUMER. Thank you, Mr. Avery. I think this is all excellent testimony, and I appreciate everybody moving things along. You probably heard the answer to the question I gave to our previous witness.

Mr. Wade Henderson is a leader in Washington and Executive Director of the Leadership Conference on Civil Rights and another longtime friend of mine, although not a New York resident.

STATEMENT OF WADE HENDERSON, EXECUTIVE DIRECTOR, LEADERSHIP CONFERENCE ON CIVIL RIGHTS, WASHINGTON, D.C.

Mr. HENDERSON. Thank you, Chairman Schumer. Again, I am Wade Henderson and I am the Executive Director of the Leadership Conference on Civil Rights. I am pleased to appear before you on behalf of the Leadership Conference to discuss the charitable choice provisions in the administration's faith-based initiative, and to discuss the potential harm to civil rights laws that could result from the failure to consider appropriate safeguards.

The Leadership Conference on Civil Rights is the Nation's oldest, largest and most diverse coalition of organizations committed to the protection of civil and human rights in the United States. It is a privilege to represent the civil and human rights community in addressing the Committee today.

I would like to make a few opening remarks, a few opening observations at the outset, and then I would like to use the remainder of my time within the five-minute framework to discuss the issue of discrimination, which is at the heart of today's hearing.

First, I would like to observe that the Leadership Conference approaches this issue with great respect for the many religiously-affiliated organizations, such as Catholic Charities USA, the United Jewish Communities, Lutheran Social Services and, yes, Habitat for Humanity, that have long received Federal, State and local funds to serve important needs in our communities. The charitable choice provisions under consideration today will have no effect on the important work of these well-known organizations.

Second, to my knowledge, none of the Leadership Conference members who oppose charitable choice are seeking to change in any way the operation of the several religiously affiliated groups that already participate in Federal programs.

Third, we also strongly support the fundamental principle that our Nation's privately funded religious organizations, our churches, synagogues, mosques and other houses of worship, should always enjoy the constitutional freedom to pursue their religious missions through their ministries to our communities.

The Leadership Conference and many of its member organizations have supported religious freedom with our own long history of working toward laws that protect religious exercise, including the right of each person to be free from discrimination based on religion.

Lastly, in this context the Leadership Conference would also like to offer its commitment to you and to other members of this Committee to work to find better, non-discriminatory ways to ensure that Federal money goes to whichever organization, whether secular or religious, that can best serve a community's needs and is willing to abide by the laws that apply to Federal contracts and grants.

We understand the frustration of many smaller, privately funded service providers—in fact, Senator Santorum mentioned it in his testimony—both religiously affiliated and secular, who feel excluded from Federal programs because the regulatory hurdles seem too high. We believe that we can find appropriate ways to bring these organizations into Federal programs, even as we remain committed to civil rights protections and other necessary safeguards. We believe that such a win-win solution is possible and it is well worth all of our efforts in trying to find it.

Now, with respect to the issue of discrimination which is at the heart of today's hearing, we observe that the issue of charitable choice threatens a cornerstone principle of American civil rights law, which is that Federal funds generally will not go to persons or institutions who discriminate against others. This principle is roughly 60 years old and began with Franklin Roosevelt and his executive order.

We think that that principle is so important we should find a way to ensure that discrimination does not occur, and we think that the current proposals under consideration, in fact, expand current law in ways that could be harmful. Now, even though we are not seeking to change religious exemptions currently in place, when you have provisions like those in S. 304 that not only track Title VII of the Civil Rights Act of 1964 in giving a religious exemption to those organizations engaged in that activity, but create a new standard that goes beyond Title VII, because it does not apply to organizations with 15 or more employees, it seems to us to be an extraordinary leap.

There is no need to create a new standard under the law simply to encourage religiously affiliated organizations to do more to provide services in communities around the country. And we would join in making that call, but the real issue is that if, in fact, you don't choose to discriminate, there is no need to expand the law beyond its current parameters.

We are happy to add additional comments and support for this position. Thank you.

Senator SCHUMER. Thank you, Mr. Henderson.

Our next witness is Nathan Diament. He is the Director of Public Policy for what we fondly know in New York as the OU, or the Union of Orthodox Jewish Congregations in America.

Thank you, Nathan.

STATEMENT OF NATHAN J. DIAMENT, DIRECTOR OF PUBLIC POLICY, UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, WASHINGTON, D.C.

Mr. DIAMENT. Thank you, Senator Schumer, and I will try to be faithful to my New York heritage and speak quickly.

I represent the Union of Orthodox Jewish Congregations, the largest Orthodox Jewish umbrella organization in the United States, entering its second century of serving the community.

I will refer you to my written testimony for our discussion of the Establishment Clause. I, like Mr. Henderson, am going to devote most of my remarks to this so-called civil rights issue. But before

I do that, I would just like to note something that was said at the outset of this hearing and I think it is important to remember, and that is that these initiatives have always been bipartisan initiatives, just like they are in the case of S. 304.

I would refer you and the other members of the Committee to the two speeches that I have appended to my testimony, one from President Bush and one delivered by Al Gore before the Salvation Army in 1999, in which I don't think you will find a more ringing endorsement of charitable choice and expanding the partnership between faith-based social service providers and the Government.

The fact that this initiative is now receiving greater attention should not be the cause for partisanship. The faith-based initiative does seem to have become a political Rorschach test, with some people projecting their worst fears upon it. But the fact that this initiative raises complex and critical questions should give rise to careful and reasoned discussion, as we have engaged in today, rather than the over-heated fear-mongering which is seen in some press releases.

With regard to the Establishment Clause, I would simply say that our view is that the Establishment Clause demands neutrality toward religion and non-religion on the part of the Government. It says that the Government may not favor the religious over the secular, but it also may not favor the secular over the sacred. The Establishment Clause, as the Supreme Court has said, demands neutrality toward religion, not hostility.

The issue I want to devote most of my time to is regarding the hiring issue. There is another religion clause, as you well know, Senator Schumer, in the Constitution, and that is there Free Exercise Clause. We in the Orthodox Jewish community are certainly concerned with issues of religious coercion, and we believe that beneficiaries of these programs are entitled to have their free exercise rights protected.

We would encourage the Government, through whatever means possible, to promote and protect the first freedom of religious liberty. But at the same time, the providers, the faith-based organizations, have free exercise rights as well, and the accusation that suggests that all American houses of worship are, in fact, houses of bigotry is unacceptable.

The Civil Rights Act of 1964 is the great bulwark against objectionable acts of discrimination, and it is Title VII of that very Act, crafted by the architects of modern civil rights law, that provides this exemption. It is interesting that Mr. Scott cited the Pew poll about this issue. If you look at that poll and if you look at the way this question was asked to the people who were polled, they were given no information and no indication that this protection for faith-based organizations is as old as 1964. They were led to believe perhaps that this is some new invention, and I think that is a critical component of this discussion as well.

The fact of the matter is that the opponents of the charitable choice initiative, having been defeated in the courts and Congress in bipartisan votes on the constitutional Establishment Clause question, have latched on to this issue to try to defeat the charitable choice initiative.

The fact of the matter is that this is a free exercise right of the faith-based organizations. Those who appreciate the role of religious institutions in America, as you do and as other members of this Committee do, should resist the easy equation that opponents assert. They seem to suggest that every act of discrimination, even those by faith-based institutions on the basis of faith, is like every other act of discrimination, and that is not true. And if it is true, the implications are dangerous indeed.

A defining element of the civil rights era was a commitment to root out invidious discrimination not only in the public sector, but in private contexts as well, at lunch counters and in motel rooms and on bus lines. If, as the critics suggest, your synagogue and mine are, in fact, such bigoted institutions, then the Federal Government ought to be rooting it out there by any means possible as well.

Why do we offer these institutions the benefit of tax-exempt status if they are full of bigotry? Why do we afford their supporters tax deductions for their contributions? Why do we hallow their role in society as we do?

There are other arguments to be made against the faith-based initiative.

Senator SCHUMER. You have spoken fast, but not fast enough, so if you could conclude.

Mr. DIAMENT. I conclusion, I will just say that there are other arguments to be made over which we may reasonably disagree, but slandering our sacred institutions with the charge of bigotry is unacceptable and must be ruled out of bounds.

[The prepared statement of Mr. Diament follows:]

STATEMENT OF NATHAN J. DIAMENT, ESQ., DIRECTOR OF PUBLIC POLICY, UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA

INTRODUCTION

Thank you, Senator Leahy and Senator Hatch, for the opportunity to address this Committee today. My name is Nathan Diament and I am privileged to serve as the director of public policy for the Union of Orthodox Jewish Congregations of America. The UOJCA is a non-partisan organization in its second century of serving the traditional Jewish community, and is the largest Orthodox Jewish umbrella organization in the United States representing nearly 1,000 synagogues and their many members nationwide.

On behalf of the UOJCA, I come before you today to address two legal issues that are relevant to the effort to expand the already existing partnership between government and faith-based social service providers: the first issue is the Constitutional issue raised by the First Amendment's religion clauses, the second issue relates to religious liberty protections contained in our nation's civil rights statutes.

But before addressing the legal issues, I would like to suggest that we step back for a moment and appreciate the broader context of our conversation today. Since this nation's founding, evaluating the role of religion in our society's public life has been part of our national conversation. But in recent months, this issue has been re-engaged with new vigor and prominence. Last year's nomination of an Orthodox Jew to a national ticket put the discussion back on the front page. This year's creation of the White House Office of Faith-Based & Community Initiatives has served as a catalyst for continuing this national discussion. The fact that we are having this discussion is in itself a wonderful thing for our democratic society.

Just as important is the fact that we are having a national discussion about finding new ways to address our social welfare challenges, particularly those confronting lower income populations. To have President Johnson's declaration of a war on poverty cited once again in public addresses appreciatively, rather than derisively is a welcome development.[1]

One more word of introduction, I believe is critical. It is the case that the Bush Administration's focus on faith-based initiatives has given this policy issue a new degree of attention. But I respectfully remind you that this is not a new initiative. It received bipartisan support in the U.S. Senate and was signed into law by President Clinton on four occasions since 1996.[2] Moreover, it was one of the few public policy initiatives that enjoyed support during the last presidential campaign from both parties' presidential candidates.

In a major address to the Salvation Army, it was candidate Al Gore who stated: "The men and women who work in faith . . .based organizations are driven by their spiritual commitment . . .they have sustained the drug addicted, the mentally ill, the homeless; they have trained them, educated them, cared for them . . .most of all they have done what government can never do . . .they have loved them." Mr. Gore went on to propose what he called a "New Partnership" under which the "charitable choice" concept would be expanded. He stated: "As long as there is always a secular alternative for anyone who wants one, and as long as no one is required to participate in religious observances as a condition for receiving services, faith-based organizations can provide jobs and job training, counseling and mentoring, food and basic medical care. They can do so with public funds—and without having to alter the religious character that is so often the key to their effectiveness."[3]

I raise this today not to minimize in the least the commitment of President Bush and his Administration to this effort which is well known, but to remind you that, to date, "charitable choice" initiatives have been *bipartisan* initiatives—just as they are in Senate Bill 304, which enjoys bipartisan sponsorship in this Committee.[4] The speeches delivered by Mr. Bush and Mr. Gore that I have appended to my testimony clearly reflect their common commitment to this cause.

The fact that this initiative is now receiving greater attention should not be the cause for baser partisanship. The faith-based initiative does seem to have become a political Rorschach test, with some interest groups projecting their worst fears upon it.[5] But the fact that this initiative raises complex and critical questions should give rise to careful and reasoned discussion—as we have engaged in today—rather than overheated fear mongering.

SOCIAL SERVICE GRANTS AND THE ESTABLISHMENT CLAUSE

America's synagogues, churches and other faith-based charities already play an important role in addressing many social challenges—through soup kitchens and literacy programs, clothing drives and job skills training, our faith communities remain the "little platoons" of our civilized society. My organization believes that these institutions can play an even larger and more beneficial role if they are supported in that effort.

We at the UOJCA do not suggest, as some might, that every faith-based social service provider will do a better job than a secular or government agency. Each of these agencies are programmed and staffed by real people—some will do better than others. We do not assert that every person in need will best be served by a faith-based provider—some will, some won't; we've long ago realized that "one-size-fits-all" approaches do not work in most contexts—we need H.U.D. and Habitat for Humanity, H.H.S. and the Hebrew Home for the Aged. Moreover, we do not believe that including faith-based providers in the partnerships that government forms should be an excuse for letting the government shirk its commitment to devote an appropriate level of financial and human resources directly to addressing social needs.[6] But we do believe that if the government decides not to go it alone, but to invite partners from the private and public interest sectors in tackling social welfare challenges, then the government ought not say to one class of agencies—"you may not be our partner because you are religious."[7]

---

[1] Remarks by President Bush at University of Notre Dame Commencement Exercises, May 21, 2001. Attached as Appendix 1.

[2] Personal Responsibility & Work Opportunity Reconciliation Act (Pub. Law 104–193); Community Services Block Grant (Pub. Law 105–285); Children's Health Act (Pub. Law 106–310); and Community Renewal Tax Relief Act (Pub. Law 106–554).

[3] Remarks by Vice President Al Gore on the Role of Faith-Based Organizations, delivered May 24, 1999. Attached as Appendix 2.

[4] Drug Abuse Education, Prevention and Treatment Act of 2001—Senators Hatch, Leahy, Biden, DeWine, Feinstein, and Thurmond—sponsors.

[5] See, Diament, A Faith-Based Rorschach Test, The Washington Post, March 20, 2001.

[6] For this reason, the UOJCA welcomed President Bush's recently announced plans to increase federal funding allocations for housing rehabilitation and drug treatment program grants. Notre Dame Commencement Address, Appendix 1.

We submit that the Constitution's Establishment Clause stands for a simple proposition: that the government may not favor one religion over others, or religion over non-religion. But it does not stand for the proposition that government must favor the secular over the sacred. The Establishment Clause, as the Supreme Court has said, demands neutrality toward religion, not hostility.[8]

Neutrality, I submit to you, means that in a grant program, government must be "faithblind," if you will. Government ought to establish grant criteria that have nothing to do with whether prospective grantees are religious or secular, but simply whether they have the capacity to perform the service and obtain the results the government seeks to achieve through the grant. That is the essence of what the Establishment Clause demands in this context.

Support for this neutrality-centered view can be found in many Supreme Court precedents the most recent of which is *Mitchell* v. *Helms*, decided just one year ago.[9] In Helms, six of the nine justices came down squarely on the side of the neutrality view of the Establishment Clause.[10] The issue before the Court was the constitutionality of a federal grant program which allows local education agencies to use federal funds for the purchase of supplementary educational materials, including textbooks and computers, for schools within their jurisdiction.[11] Because the aid was also made available to parochial schools within the jurisdiction, it was challenged as a violation of the Establishment Clause.[12] The Court rejected this challenge.

Justices Thomas, Rhenquist, Kennedy and Scalia rejected the challenge on the basis of a neutralitycentered understanding of the Establishment Clause without any qualifications.

For these justices, so long as secular government aid is provided to religious institutions on the basis of religion-neutral criteria it does not violate the Establishment Clause, and the constitutionality of currently enacted and pending charitable choice laws is unquestionable.

Justice O'Connor, joined by Justice Breyer, also invoked the principle of neutrality, but with qualifications.[13] Inasmuch as this concurrence was essential to the Court's holding, it can be said that it is the O'Connor opinion that is controlling. Working with the framework she developed previously in *Agostini* v. *Felton*,[14] Justice O'Connor determined that the program at issue did not violate the Establishment Clause because it furthered a secular purpose, did not have the primary effect of advancing religion,[15] and did not raise the likelihood that an "objective observer"[6] would believe the program was a governmental endorsement of a particular religion.

---

[7] This is exactly what the four existing charitable choice laws do; they do not provide for the indiscriminate funneling of government funds to churches and synagogues, they do provide that government grant makers cannot red-line such programs out of the funding pool on the sole basis of their religious character. Moreover, while charitable choice provisions permit participation by faith-based organizations, such participation is not mandated in any way.

[8] "'It has never been thought either possible or desirable to enforce a regime of total separation'. . . nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984).

The Court will speak again to the Establishment Clause and the neutrality principle before the end of this month when it rules in the pending case of *Good News Club* v. *Milford Central School District*. This case challenges the policy of a New York school district that allows its public school facilities to be used for meetings by a wide range of civic and youth groups after school hours, but refused to allow a Christian youth group to use facilities for its meetings due to their religious content.

[9] 530 U.S. 793, 120 S.Ct. 2530 (2000).

[10] This position is clearly enunciated by the plurality opinion of Justices Thomas, Rhenquist, Scalia and Kennedy and is at the core of the concurrence by Justices O'Connor and Breyer.

[11] Chapter 2 of the Education Consolidation and Improvement Act of 1981, Pub. L. 97–35, 95 Stat. 469, as amended, 20 U.S.C. § 7301–7373.

[12] Many public interest organizations, including the UOJCA, filed friend of the court briefs in the Helms case. Not surprisingly, those who question the neutrality principle today in the context of charitable choice also questioned it there. It is worth noting that the Solicitor General, on behalf of Secretary of Education Richard Riley, argued in support of the program's constitutionality. *See*, http://supreme.lp.findlaw.com/supreme court/dockeddecdocket.html#98–1648.

[13] Justice O'Connor was not prepared to accept what she viewed as the plurality's "treatment of neutrality [as a] factor of singular importance" above other factors developed in the Agostini case. 120 S. Ct. at 2556.

[14] 521 U.S. 203 (1997), upholding a government funded program for secular special education teachers to teach in parochial schools. Writing for the Court's majority in Agostini, Justice O'Connor revised the much-maligned three prong test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

It is important to note that, as part of this analysis, Justice O'Connor, like the *Helms* plurality, explicitly rejected the precedents of *Meek* v. *Pittinger*[17] and *Wolman* v. *Walter*,[18] which had held even the capability for (as opposed to the actual) diversion of government aid to religious purposes to be sufficient grounds to render an otherwise neutral aid program an Establishment Clause violation.[19] Justice O'Connor embraced this position even after distancing herself from what she characterized as the "plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause."[20] Finally, Justice O'Connor stressed that the aid provided under the education grant program was "secular, neutral and nonideological," supplemented funds from private sources, and was expressly prohibited from being used for religious instruction purposes.[21]

Taking all of these considerations together, it is possible to construct a regime under which faithbased organizations may receive government social service grants in a manner consistent with the latest interpretation of the Establishment Clause.[22] This regime is evidenced in the previously enacted charitable choice laws and in your bill, 5.304. The eligibility criteria for receiving a grant are religion neutral.[23] The grant program serves the secular purpose of providing social welfare services to needy individuals. The grant funds are expressly prohibited from being "expended for sectarian worship, instruction or proselytization."[24] And Justice O'Connor's sophisticated "objective observer" would not believe that government support for the faith-based provider under this legislation constituted the endorsement of the particular religion.[25] Moreover, the bill's accounting and auditing requirements[26] are a safeguard against the diversion of funds for religious purposes, as well as an appropriate means of ensuring that public funds are expended for their specifically intended programmatic purposes.[27]

FREE EXERCISE OF RELIGION CONSIDERATIONS; FOR PROGRAM BENEFICIARIES

There are other safeguards in charitable choice laws that are not necessitated by the

Establishment Clause, but by the Constitution's Free Exercise Clause—a feature of the First Amendment that ought to carry equal weight to the Establishment

---

[15] For Justice O'Connor, the question of whether an aid program has the primary effect of advancing religion is determined by whether: a. the aid is actually diverted for religious indoctrination; b. the eligibility for program participation is made with regard to religion; and c. the program creates excessive administrative entanglement.

[16] Justice O'Connor's "objective observer" is not the typical person on the street, but a person "acquainted with the text, legislative history, and implementation of the statute." *Wallace* v. *Jaffree*, 472 U.S. 38, 76 (1985).

[17] 421 U.S. 349 (1975).

[18] 433 U.S. 229 (1977).

[19] 20 S. Ct. at 2562.

[20] 20 S. Ct. at 2558. Justice O'Connor notes that the plurality bases its reasoning for this point on the Court's precedents that have allowed government aid to be utilized to access religious instruction, specifically *Witters* v. *Washington*, 474 U.S. 481 (1983), and *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). O'Connor correctly notes that those cases relied heavily on the "understanding that the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use," 120 S. Ct. at 2558, as opposed to a per-capita, direct aid program at issue in *Helms*. With regard to this issue in this context of direct aid to faith-based social service agencies, *see below* at note 27.

[21] 20 S. Ct. at 2569.

[22] Of course, *Mitchell* v. *Helms* and the long line of school/religion cases that came before it pose Establishment Clause questions squarely in the area of K–12 education, where the Court has been most sensitive to Establishment Clause concerns. It is quite plausible that an assessment of the constitutionality of charitable choice programs would employ more relaxed criteria than those discussed in the *Helms* opinion.

[23] S.304, § 701 (a) provides that "the government shall consider, on the same basis as other nongovernmental organizations, religious organizations to provide assistance. . ."

[24] S.304, § 701(h).

[25] Bipartisan legislation pending in the House of Representatives addresses this point even more explicitly by stating that the receipt of funds by a religious organization "is not and should not be perceived as an endorsement by the government of religion." H.R.7, § 201(c)(3).

[26] S.304, § 701(f).

[27] These last two provisions lessen the need for the aid to flow on the basis of private and independent choices discussed above, note 20. At the same time, it is certainly the case that any "voucherized" mechanisms, as opposed to direct grants, for charitable choice will satisfy the conditions set out by Justice O'Connor in this regard. From a policy standpoint, however, a voucher-based approach has two principle shortcomings; it reinforces the non-neutral treatment of religious entities and it biases against newer participants and programs who cannot overcome start-up costs while waiting for vouchers to be presented by beneficiaries.

Clause but, for a variety of reasons, often seems forgotten—even by the Supreme Court.[28]

As members of a minority religion in this country, we in the Orthodox Jewish community are terribly sensitive to the issue of religious coercion in general, and certainly in situations where government support, albeit indirect, is involved. We believe government should bolster the "first freedom" of religious liberty at every opportunity. Thus, we would insist that there be adequate safeguards to prevent any eligible beneficiary from being religiously coerced by a government-supported service provider. We believe that a requirement that each beneficiary be entitled to a readily accessible alternative service program and that each beneficiary be put on specific notice that they are entitled to such an alternative is the proper method for dealing with this issue. Moreover, as a condition for receiving federal assistance, faith providers must agree not to refuse to serve an eligible beneficiary on the basis of their religion or their refusal to hold a particular religious belief. These safeguards are contained in 5.304.[29]

FREE EXERCISE OF RELIGION CONSIDERATIONS; FOR FAITH-BASED PROVIDERS

There are also critical religious liberty considerations with regard to the protections afforded to religious organizations by the Constitution and federal civil rights laws. As you are already aware, the one that has received considerable attention from critics of the faith-based initiative is the thirty-seven year old federal law[30] permitting religious organizations to hire employees on the basis of religion.[31] A few basic points must be made with regard to this argument which, I believe, will set the record straight and refute the accusation that suggests that all American houses of worship are, in fact, houses of bigotry.

As the members of this Committee are well aware, the Civil Rights Act of 1964 is the great bulwark against objectionable acts of discrimination and Title VII of that Act bans discrimination in employment on the basis of race, ethnicity, gender, religion and national origin. It was the very same architects of modern civil rights law who created a narrow exemption in the 1964 Act permitting churches, synagogues and all other religious organizations to make hiring decisions on the basis of religion.[32]

It would be absurd, to say the least, to suggest that a Catholic parish could be subjected to a federal lawsuit if it refused to hire a Jew for its pulpit. In 1972, still the heyday of civil rights reforms, Congress expanded the statutory exemption to apply to virtually all employees of religious institutions, whether they serve in clergy positions or not. The Free Exercise Clause demands this broad protection, and in 1987, the Supreme Court unanimously upheld the Title VII exemption as constitutional.[33]

---

[28] Members of this Committee are well aware of the Court's recent apathy toward the Free Exercise Clause beginning with Employment Division v. Smith, 474 U.S. 872 (1990), resulting in the passage of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. "RFRA" was struck down by the Court in City of *Boerne* v. *Flores*, 117 S.Ct. 2157 (1997) to which congress, led by members of this Committee, responded last year with the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc.

[29] § 701 (d) and § 701(e), respectively. Some have suggested that allowing a beneficiary to opt out of the faith-related portions of the faith-based agency's program while being entitled to partake of the secular portions of the program is an appropriate safeguard. This too is contained in S.304, § 701(e)(1): "A religious organization providing assistance. . .shall not discriminate. . .on the basis of. . .a refusal to actively participate in a religious practice." We believe this is insufficient. It would force beneficiaries to constantly assert their objection in contexts where that might be difficult, if not awkward. The best safeguard, in the view of the UOJCA, for the religious "objector" is to facilitate his or her participation in an acceptable alternative program.

[30] A recent survey conducted by the Pew Forum on Religion and Public Life noted broad support for the faith-based initiative overall, but concerns over permitting religious social service providers to receive government funds while continuing to possess the right to hire on the basis of religion. At no point, however, was any information offered to the respondents apprising them of the limited nature of the exemption, see below, or its creation as part of the Civil Rights Act of 1964. See, http://pewforum.org/events/0410/report/topline.php3.

[31] Section 702 of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e-1, provides in relevant part: "This subchapter shall not apply. . .to a religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

[32] Religious institutions remain bound by prohibitions against employment discrimination on the basis of race, ethnicity and the like.

[33] *Corp. of Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987). The majority opinion assumed only "for the sake of argument" that the § 702 exemption as enacted in 1964, prior to its 1972 expansion by congress, was sufficient to meet the requirements of the Free Exercise Clause, 483 U.S.

This well-established law has now become a central feature of the opposition to charitable choice; so much so that the interest groups who have joined together to fight charitable choice over the last few years have called themselves the "Coalition Against Religious Discrimination" and decry the fact that this initiative will "turn back the clock on civil rights."

In fact, what is happening here is savvy political gamesmanship, not substantive argument. These very same opponents have lost their argument for the strictest view of church-state separation in the courts and in Congress. After all, the charitable choice laws that I described earlier received bipartisan support in the face of their protestations. Thus, they have cast about for a more potent political argument, and have found it in invoking the evils of discrimination—something all Americans rightly oppose.

But the assumption underlying the opponents' assertion is that faith-based hiring by institutions of faith is equal in nature to every other despicable act of discrimination in all other contexts. This is simply not true. In fact, in the incredibly diverse and fluid society that is America 2001, religious groups are increasingly open and reflective of that diversity. There are now black Jews, Asian Evangelicals and white Muslims and these trends will only increase. This is because, at their core, religious groups are supposed to care not about where you come from or what you look like, only what you believe.[34] Religious institutions are thus compelled to ignore a person's heredity and champion his or her more transcendent characteristics.[35]

Those who appreciate the role of religious institutions in America should resist the easy equation the opponents assert, for its implications are dangerous indeed. After all, a defining element of the civil rights era was a commitment to root out invidious forms of discrimination not only in public institutions, but in the private sector—at lunch counters, in motel rooms and on bus lines. If faith institutions' hiring practices are so terribly wrong, are we not obligated to oppose them however we can irrespective of whether they receive federal funds? If, as the critics suggest, your church and my synagogue are such bigoted institutions, why do we offer them the benefit of tax-exempt status? Why do we afford their supporters tax deductions for their contributions? Why do we hallow their role in society as we do?

There are other arguments to be made against the faith-based initiative over which we may reasonably differ. Some people may hold fast to a vision of stricter separation of church and state—even in the face of Supreme Court decisions to the contrary, while others may believe that the best way to serve Americans in need is solely through government agencies. We ought to vigorously debate these points as we have at this hearing. But slandering our sacred institutions with the charge of bigotry is unacceptable and must be ruled out of bounds.

A second rejoinder, with regard to the specific goals of this policy initiative, is important as well. If the goal of charitable choice is to leverage the unique capacities of faith-based providers with government grants, to force them to dilute their religious character is the same as saying you don't believe in the whole enterprise.[36] The critics, obviously do not, but we believe that, carefully considered and properly structured, expanding the partnership between government and faith-based social service agencies is a critical component of a strategy to bring new solutions to America's social welfare challenges.

---

at 336, while Justice Brennan, joined by Justice Marshall, suggested that the broader exemption was also supported by Free Exercise requirements; he noted that "'[r]eligion included important communal events for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] [C]lause.'" 483 U.S. at 341, quoting Laycock, Towards a General Theory of the Religion Clauses, 81 Colum.L. Rev. 1373, 1389 (1981).

[34] Secular groups that are ideologically driven—from liberal to conservative—function in a similar manner and enjoy an analogous constitutional protection for their hiring practices under the freedom of expressive association, also recognized under the First Amendment. Thus, even though Planned Parenthood may receive government grants, it cannot be compelled to hire pro-lifers.

[35] Of course, one cannot overlook the fringe groups such as the Church of the Creator and Aryan Church that propound a "theology" of racial and ethnic hatred and hold themselves out as "religions." They are despicable and give mainstream religions a bad name. But we don't generally make our public policy decisions on the basis of the radical extremist; we afford everyone the freedom of speech even though it will benefit the neo-Nazi or the flag-burner. This approach should not be abandoned here.

[36] Again in Vice President Gore's words, "the religious character [of these organizations] that is so often the key to their effectiveness." Appendix 2. See also, Jeffrey Rosen, Religious Rights, *The New Republic*, February 26, 2001.

CONCLUSION

At the end of the day, the debates surrounding the faith-based initiative come down to questions of cynicism versus hope. The cynics see a slippery slope down every path; some see deeply religious people as untrustworthy—incapable of following regulations and perpetually plotting to proselytize their neighbor, while others see every civil servant as a regulator lacking restraint just waiting to emasculate America's religious institutions.

But if we set our minds—and our hearts—to it, we can find a way to be more hopeful. After all, what this is really about is bringing some new hope and some real help to people in need through a new avenue.

Senator SCHUMER. Thank you.

Our next witness is Mr. Doug Laycock. Mr. Laycock is the Associate Dean for Research at the University of Texas Law School. We are hearing from him in his capacity as a legal scholar.

STATEMENT OF DOUGLAS LAYCOCK, ALICE MCKEAN YOUNG REGENTS CHAIR IN LAW, UNIVERSITY OF TEXAS, AUSTIN, TEXAS

Mr. LAYCOCK. Thank you, Senator Schumer, and I should also say that in my capacity as a supporter of separation of church and state, and given the lineup today maybe it is relevant to say the last thing I did on the separation issue was represent the parents who successfully objected to opening Texas football games with prayers. That was a radically separationst position in Texas. It interfered with two religions, as best I could tell.

As Senator Leahy and Senator Hatch said at the beginning of this hearing, billions of dollars of government money passes through religious charities and religious social services organizations every year. So what is the problem? What is new about this bill?

One thing I would say is billions of dollars every year and 2 cases in the Supreme Court in 100 years about social services. We have had a 150-year battle over funding of religious schools. We have had no remotely comparable battle legally or politically over funding of religious social services, until the debate over this legislation.

I would not assume that the Supreme Court's school cases apply to social services. They may, but historically there have simply been two lines of cases and the church social services funding has been upheld. So this is not a funding bill; this is a religious liberties bill.

Charitable choice contains three principles that protect the religious liberty of providers and of beneficiaries that are not in the current law that is sending that $3 billion a year. One is non-discrimination among providers. Today, the executive is free to contract with religious providers, free to boycott religious providers and contract only with the secular, free to contract only with Catholic charities and not with Jewish charities. There is no statutory non-discrimination, and the constitutional non-discrimination rule is little known, little developed and not enforced.

Charitable choice bills provide no discrimination against the religious providers, and I think it would be better frankly if they made it both ways—no discrimination in favor of religious providers or among religious providers either.

Second, charitable choice deregulates the religious providers. It makes explicit in this statute for the first time that you don't have to secularize your operations in order to be eligible for a Government contract. If you deliver full secular value for the Government's money, then you can do whatever religious operation on top of that you want to do. That is not in the current law either, and that does indeed protect the religious liberty of the providers.

Hiring is an essential part of that, and let me just say it is not part of our law and it has not been part of our law that federally assisted religious organizations cannot discriminate on the basis of religion. Federally assisted organizations can't discriminate on the basis of race or sex or handicap, but there is no such law about religion. A reminder that was in the news is when Yale University got sued last year for discriminating against Orthodox Jews in its dormitories, there was no Federal spending statute involved in that. They had to rely on State law.

Third, it protects beneficiaries. There is under current law no right to have an alternate provider. If Catholic Charities has the contract in your town, you go to Catholic Charities. You are not protected in your right to go anywhere else. Charitable choice introduces that for the first time.

Now, let me emphasize, because I don't have time to develop it, in my written testimony I say these three protections are important, but they are very hard to implement. It is hard to guarantee that there will be two providers side by side, especially in small towns all across America. It is hard to control the bureaucrats who award these contracts and make sure they don't discriminate or don't try to regulate the churches anyway.

I wish the Committee and the witnesses were spending more time on implementation and less time on the underlying question. I think this is sound in principle. It protects religious liberty, in principle. It is pro-separation of church and state, in principle. The difficulty is in the details. How do you actually implement these three protections in a world with not nearly enough government money to go around and less government money in the future than there has ever been in the past?

[The prepared statement of Mr. Laycock follows:]

STATEMENT OF DOUGLAS LAYCOCK, UNIVERSITY OF TEXAS LAW SCHOOL

Thank you for the opportunity to testify on the legal issues surrounding charitable choice. This statement is submitted in my personal capacity as a scholar. I hold the Alice McKean Young Regents Chair in Law at The University of Texas at Austin, but of course The University takes no position on any issue before the Committee.

I. SEPARATION OF CHURCH AND STATE.

The debate over charitable choice has been cast as a debate over separation of church and state. I think the usual formulation of the charitable choice debate is misleading, for reasons I will explain. But let me begin by making clear my own starting premises.

I support the separation of church and state. The religious choices and commitments of the American people should be as separated as possible from the influence of government. The religious choices and commitments of believers and of non-believers should be equally protected, and equally insulated from government influence.

Church-state questions arise in three great clusters of issues: government regulation, government speech, and government money. With respect to government regulation, I have often testified to this committee about the need to separate religious practices from government regulation. With respect to government speech, most recently I represented the parents who objected to Texas high schools opening their football games with prayer. *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000). In Texas, that is a more radically separationist position than anyone outside Texas can fully appreciate.

With respect to government money, I long accepted the widespread fallacy that the ultimate goal is to separate religion from government money. But I have gradually come to realize that that is a means, not an end. The goal is to separate private religious choices and commitments from government influence, including the powerfully distorting influence that government can buy with its money. Government should minimize its influence over the religious choices and commitments of both the providers and the beneficiaries of government-funded social services. That goal is difficult to achieve, but charitable choice is a step in the right direction.

Think of government setting out to buy secular goods and services in the marketplace. It wants wine for the State Department, or sausage for the Army. Or it wants medical care for its citizens, or child care, or drug treatment. Government spends a lot of money on these things.

When it purchases secular goods or services, government has three choices with respect to religion:

1. Government can prefer religious providers.
2. Government can prefer secular providers.
3. Government can buy without regard to religion (e.g., from all qualified providers, or from the low bidder, or on some other neutral criterion).

Which rule better separates the religious choices and commitments of the American people from the influence of government? Buying only from the religious, or only from the secular, creates powerful incentives to change religious behavior. Rule 1 says, "Get religion and we'll do business with you." Rule 2 says, "Secularize yourself, and we'll do business with you." Some potential providers cannot or will not change; under the first two rules, they will be penalized for their religious or secular commitments. Other potential providers are more pliable; government will coerce them into changing their religious behavior.

It is actually Rule 3, buying without regard to religion, that minimizes government's influence on religious choices and commitments. If government buys without regard to religion, no one has to change their religious behavior to do business with the government. That is the key concept of charitable choice. It is a good concept. Despite the conventional wisdom of many separationists, funding everyone equally separates private religious choice from government influence more effectively than funding only secular providers.

So what does the Establishment Clause mean under this view? It means a lot. Government cannot sponsor, endorse, or pay for religious beliefs or religious functions. It can buy from religious providers, but it can buy only secular goods or services. The essential safeguards of the establishment clause are that government must get full secular value for its money, and that no one may be coerced, steered, or encouraged towards or away from a religious practice or a religious provider of services. If a religious provider wants to add religious services in conjunction with the government-funded secular services, the religious provider must pay for the religious services itself, and no beneficiary of the government-funded program can be required to participate.

Charitable choice would be an important step in the right direction. Even so, there are problems of implementation, and many ways to get this wrong. And there are many misconceptions in the current debate.

II. WHAT IS OLD.

Throughout most of our nation's history, government has paid religious organizations to deliver social services. The founders did it without apparent controversy; even Thomas Jefferson sent missionaries to run schools for Indians. Current programs, not under the rubric of charitable choice, spend vast sums through religious charities.

You will likely hear that charitable choice flatly violates the original understanding of the Establishment Clause. That claim is not true; it conflates two issues that the founders treated separately. I have studied that history at length, and I have written two separationist articles, refuting overbroad historical claims of those who want more government support for religion. Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875 (1986); Douglas Laycock, "Noncoercive" Support for Religion: Another False Claim About the Establishment Clause, 26 Val. U.L. Rev. 37 (1992). There is simply no doubt that the founders squarely rejected financial support for churches, even if that support were even-handed and nonpreferential.

But the issue in the 1780s was the funding of the religious functions of churches— the salaries of clergy and the building and maintenance of places of worship. Funding education or social services was simply not an issue in their time. The modern question is whether government can pay religious and secular providers even-handedly to deliver secular services. The founders had nothing to say about that issue.

The modern issue first arose in the nineteenth-century battle over schools. Protestants controlled the public schools, conducted Protestant religious exercises and taught Christianity in ways acceptable to Protestants. Catholics objected and sought funding for their own schools. Protestants were more numerous, and they won the fight. They said that their own religious exercises in the public schools were nonsectarian, and therefore constitutionally unobjectionable, but that Catholic schools were sectarian, and that funding those schools even for math and reading would be like funding the church itself. The Supreme Court has rejected the first half of this remarkable theory; it now prohibits religious exercises in the public schools. The second half—that funding religious schools is like funding churches—still affects Supreme Court doctrine in the school cases, but to an ever declining extent. This doctrine is not traceable to the founders or to the First Amendment. It originates in the Protestant position in the nineteenth-century school wars, and the nineteenth-century Protestants conspicuously failed in their effort to write this doctrine explicitly into the Constitution.

The Protestant hostility to funding religious schools never extended to funding religious social services—probably for the simple reason that many Protestants provided social services but until recently, few Protestants ran schools. Whatever the reasons, funding of religious social services has been remarkably uncontroversial. We have had more than a century of bitter political and legal battles over funding religious schools, but until now, almost no conflict over funding religious social services.

I know of only two Supreme Court cases. *Bradfield* v. *Roberts*, 175 U.S. 291 (1899), upheld a contract in which Congress paid for a new building at a religious hospital and paid the hospital to care for indigent patients. *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), upheld the Adolescent Family Life Act, under which the government contracted with many providers, including religious ones, to provide counseling and services related to adolescent sexuality and pregnancy. The Court noted "the long history of cooperation and interdependency between governments and charitable or religious organizations." *Id.* at 609.

So we have a long and largely uncontroversial history of government funding social services through religious providers. That is what charitable choice does, yet there is suddenly a huge controversy. Why? What is new about charitable choice? Three things so far as I can tell: protection against discrimination, deregulation of religious providers, and protection of program beneficiaries.

III. WHAT IS NEW.

A. ENDING GOVERNMENT DISCRIMINATION.

Under most of our existing and historic programs, contracting with a religious provider is discretionary with the executive. Some bureaucrats prefer to deal with religious organizations; some prefer to avoid them. Some bureaucrats may prefer certain religions and avoid others. There has generally been no statutory obligation of equal treatment. Any constitutional obligation of equal treatment is little known and undeveloped. Bureaucrats have felt free to discriminate, and they have done so. Opinion polls show that much of the public wants to discriminate openly and flagrantly, funding services from churches they admire, and refusing to fund services from churches they do not admire.

Charitable choice prohibits discrimination against religious providers. This is a step forward for religious liberty. It tells the executive that it cannot use its control of government spending to influence or penalize religious choices and commitments; it must instead try to minimize its influence on those choices and commitments. It would be even better to prohibit all discrimination on the basis of religion—to equally prohibit discrimination against secular providers, against religious providers, or among religious providers of different faiths.

B. DEREGULATING PROVIDERS.

Charitable choice proposals deregulate the religious providers. They state that religious providers need not secularize themselves to be eligible. These provisions protect religious liberty and enhance separation of church and state.

It has been common for religious providers to create a separate not-for-profit corporation to contract with the government. I am not an expert on the details of social service programs; I don't know how often such a requirement appears in statutes, how often it is imposed by the executive, or how often it is just the common practice and only assumed to be a requirement. But this tradition is a centerpiece of the opposition to charitable choice. Opponents say government can't pay the church to feed the homeless, but that the church can create a wholly-owned subsidiary or affiliate corporation, and government can pay this church affiliate to feed the homeless.

This is a formalistic distinction that does nothing to protect religious liberty. Corporate affiliates exist in filing cabinets and the minds of lawyers; they may be wholly intertwined operationally. Either the church or its affiliate may respect or abuse the religious liberty of the clients it serves under the government-funded program. I am concerned about the actual operation of the program, not about how many corporations have been formed.

There is some support in the cases for this notion that two corporations matter—but not much. Bradfield v. Roberts, the 1899 opinion upholding government money to a religious hospital, is written on the ground that the hospital is not the church, but merely a corporation controlled by the church. This has always struck me as classic nineteenth-century formalism, but at any rate, the opinion does not create a requirement of separate incorporation. It simply decides the case before it, in which separate incorporation was one of the facts.

In the cases on religious schools, the Court has created a category of institutions it calls "pervasively sectarian." Even at the height of restrictions on aid to religious schools, some forms of aid could go to pervasively sectarian institutions, but aid to those institutions was more tightly restricted than aid to other religious institutions that were not pervasively sectarian. This doctrine is said to support the requirement of two corporations; opponents of charitable choice presume that the church itself is pervasively sectarian, but that its affiliate may not be. The presumption is fallacious; a church might operationally separate its delivery of social services from its purely religious functions, whether or not it separately incorporates them, and the separately incorporated affiliate might combine its religious and secular work.

With respect to social services, the Court reserved the question of pervasively sectarian providers in *Bowen* v. *Kendrick*. See 487 U.S. at 611, following cases which it characterized as having "left open the consequences which would ensue if they allowed federal aid to go to institutions that were in fact pervasively sectarian." More recently, four justices in a school case repudiated the whole concept of pervasively sectarian, correctly noting that the Court had steadily reduced its reliance on the concept, that the concept had originated as a code word for Catholic, and that it had grown directly out of virulent nineteenth-century anti-Catholicism. *Mitchell* v. *Helms*, 530 U.S. 793, 828-29 (2000) (plurality opinion). Two more Justices, concurring, did not join in the concept's overt repudiation, but neither did they rely on it. Id. at 836-67 (O'Connor, J., concurring). It seems quite unlikely that the distinction between pervasively sectarian institutions and other religious institutions will be revived and actually extended to control cases about social services. Charitable choice legislation should not codify this discredited concept.

Whether there is one corporation or two, the real question is whether the religious provider must secularize the part of its operation that delivers government-funded services. Certainly it must fund any religious elements itself; government can pay only for secular services. But must it abandon religious elements altogether? Charitable choice proposals say no, and that is the right answer.

To say that a religious provider must conceal or suppress its religious identity, refrain from religious speech, remove religious symbols from its work area, or hire people who are not committed to its mission, is an indirect way of saying that government can contract only with secular providers. Attaching such conditions to a government contract uses the government's power of the purse to coerce people to abandon religious practices. Such coercion is just as indefensible as if the government coerced people to participate in religious practices. Charitable choice provisions that protect the religious liberty of religious providers are pro-separation; they separate the religious choices and commitments of the American people from government influence.

The ultimate irony in this debate are the people who oppose charitable choice on the ground that if religious organizations take government money, they will eventually be regulated and secularized—and then also oppose charitable choice on the ground that it protects religious providers against secularizing regulation. They cannot have it both ways. The status quo, in which bureaucrats have discretion to contract with religious providers or boycott them, on whatever conditions the executive chooses to impose, is far more dangerous to religious organizations than a charitable choice bill with clear protections against discrimination and against secularization.

C. PROTECTING BENEFICIARIES.

The third change in charitable choice is that it provides explicit protection for the religious liberty of the beneficiaries of government programs. They are entitled by statute to a secular provider on demand. If they choose to accept a religious provider, they may be exposed to religious exercises, but they cannot be required to actively participate.

These are important protections, and I would not support any bill that omitted them. They do not exist in present law. When a bureaucrat chooses to contract with Catholic Charities, no current law requires that he have a secular provider available for all those who request it. And any constitutional protections for program beneficiaries are, like the protections for providers, little known and undeveloped.

IV. IMPLEMENTATION.

Charitable choice is in principle a great improvement for religious liberty. But the difficulties of implementation are serious. Those difficulties are not new; they exist under the status quo, where they have received no serious attention from either side. These difficulties are more visible under charitable choice, because contracts with religious providers are more visible, and both sides have begun thinking about the difficulties. I doubt that either side has thought enough.

I am no expert on government grants and contracts or on the delivery of social services. I cannot offer full solutions to these problems, but I can flag some of the more obvious risks.

A. ENDING GOVERNMENT DISCRIMINATION.

Charitable choice says government cannot discriminate in the award of grants and contracts. How do you enforce that? Legislatures have found it necessary to enact procurement laws with so many protections against corruption that the process of buying anything for the government has come to be a standard source of jokes. To the usual risks of government contracting, add the religious biases of the general public and of the officers awarding the grants and contracts. Some of them are deeply religious; some of them are strongly secularist; nearly all of them like some religions more than others, and have some religions they really mistrust. Choosing someone to deliver social services is more complex than picking the low bidder on a pencil contract. How do you keep thousands of government employees, federal, state, and local, from discriminating on religious grounds when they award grants and contracts?

I don't know the answer to that question. We are learning that just telling them not to discriminate doesn't work. It appears that open and obvious religious discrimination continued under the limited charitable choice provisions enacted in 1996. Amy Sherman's study, reported at a House hearing in April, found that some states are contracting frequently with religious providers, and that others are not doing so at all.

I don't know how you police bureaucrats, but I think you have to assume that many of them will continue to engage in religious discrimination despite the enactment of charitable choice. Some will refuse to deal with religious providers; some will refuse to deal with non-Christian religions, or non-Western religions; some will prefer religious providers and discriminate against secular providers. You at least need a reporting requirement, so that implementation can be monitored, and you may need to require explanations of any obvious over-or-under representation of religious providers. As we have learned from the civil rights experience, resolving claims of subtle discrimination is a difficult task.

Decentralization reduces the risk of discrimination. For those services that can feasibly be delivered through vouchers, vouchers privatize the choice of providers and thus deprive government employees of the opportunity to discriminate. Decentralized contract awards, with many government employees choosing providers, spreads the risk of discrimination better than centralized contract awards with one or a few employees choosing providers.

B. DEREGULATING PROVIDERS.

Charitable choice proposals have made the most conceptual progress with respect to deregulating providers. Existing legislation and other pending proposals have clear and specific provisions to protect the religious liberty of providers who accept government grants or contracts.

These protections have to be in the statute, because no one can count on the courts to provide them constitutionally. The federal courts systematically underprotect the free exercise of religion, and the Supreme Court believes that when the government awards a contract, it can define the job very precisely and attach all sorts of conditions to ensure that the contractor adheres to the job specifications. *Rust* v. *Sullivan*, 500 U.S. 173 (1991). When Congress means to deregulate, it has to say so.

It would be better to vote down charitable choice than to remove the deregulation of religious providers. From a religious liberty perspective, the worst outcome would be to codify a rule that government offers money to religious providers but only on condition that they agree to secularize themselves. An unambiguous and highly visible offer of government payments to change one's religious practice would be worse than the muddled, regulated, and discriminatory status quo.

These protections will be somewhat easier to enforce than the basic rule of no discrimination in the award of contracts, because victims of violations will know immediately when government asks them to change their hiring rules or downplay their religious message. Still, you have to assume that there will be political and bureaucratic resistance to the deregulation of religious providers, and that continued vigilance will be necessary to make it work.

C. PROTECTING BENEFICIARIES.

Most charitable choice proposals provide equally clear protections for program beneficiaries. Beneficiaries should be entitled to a secular provider on demand, to decline to actively participate in religious exercises, and to clear notice of these rights. But these rights may be very difficult to implement.

Social service programs have never been funded sufficiently to meet the need, and recent legislation ensures that these programs will be even more severely starved for funds in the future. We have not succeeded in guaranteeing even one provider for all the people who need these services. How can we plausibly guarantee a choice of providers?

The problem is hard enough in big cities; it is far worse in small towns and rural areas. It is hard to envision religious and secular providers operating side by side with government funds in New York City. It is impossible to imagine in Waxahachie, Texas. Nor do I think it is just a matter of sending one or a few dissenters to a private practitioner. Private practitioners tend not to locate in low-income areas, and anyway, there may be many beneficiaries who don't want a religious provider. The beneficiaries are vulnerable and dependent and may be afraid to assert their rights, but government and government-funded providers should not take advantage of that. The goal should be to give each beneficiary his free choice of a religious or secular provider, and at the very least, not to push a religious provider on anyone. I suspect that is a much bigger challenge than the sponsors of charitable choice have talked about in public.

Again, these problems are probably no worse than under the status quo; they are just more visible. When government contracts with religious providers today, I am not aware that it makes any effort to provide secular alternatives. Once gain, charitable choice is an improvement in concept. But implementation is likely to be difficult.

D. PROGRAM EFFICACY.

A frequent policy question about charitable choice is whether religious providers will help more beneficiaries than secular providers. I don't know; social services are not my field. But my work on religious liberty and the associated experience of religious diversity makes me nearly certain that that is the wrong question.

The right question is whether religious providers will help different beneficiaries than secular providers. If some people in need respond to religious messages but not secular ones, and other people in need respond to secular messages but not religious ones, then the only way to help both groups is to make available both religious and secular providers.

Whether there are significant numbers of people in both groups is an empirical question, but the answer will surely be yes. There are many Americans for whom God is the only source of ultimate meaning and for whom religious messages are more motivating than any secular message ever could be. There are many others for whom stories of God are a giant fraud or a giant game of pretend. And there are yet many others in between, whose views of God are not strong enough to motivate either reform or resistance. Given the enormous diversity of religious views in the country, it seems almost inevitable that there will be a similar diversity of responses to religious and secular providers of social services, and that each type of provider may reach some beneficiaries that the other type of provider could not.

In any event, the question to ask is not whether religious providers will help more people than secular providers, or vice versa. The question to ask is whether offering people a choice of religious or secular providers will help more people than exclusive reliance on one or the other.

V. CONCLUSION.

Religion should not be forced on any American, but neither should any American be excluded from the operation of social welfare programs because of his religion, or lack thereof. The Religion Clauses are designed to let people of fundamentally different views about religion live together in peace, in mutual liberty, and in equality. Religious choices and commitments are left to the private sector, and to that end, government should neither prefer the religious nor prefer the secular. In its own operations, it must necessarily be secular. But when it chooses to contract out to the private sector, it should contract without regard to religion. This principle minimizes government influence on religion and thus maximizes religious liberty, and this is the true meaning and purpose of separation of church and state.

Minimizing government influence is easier said than done. Charitable choice is admirable in its commitments to nondiscrimination on the basis of religion, to deregulating religious providers, and to protecting program beneficiaries. But each of these commitments will be difficult to implement; each of them requires careful attention from the Congress and from those expert in the delivery of social services.

Senator SCHUMER. Thank you, Mr. Laycock. You are not from New York, but you spoke almost as fast as Mr. Diament.

Our final witness is Mr. Richard Foltin, the Executive Director and Counsel in the American Jewish Committee's Office of Government and International Affairs.

STATEMENT OF RICHARD T. FOLTIN, LEGISLATIVE DIRECTOR AND COUNSEL, AMERICAN JEWISH COMMITTEE, WASHINGTON, D.C.

Mr. FOLTIN. Thank you. I am an expatriate New Yorker and I will also try to speak quickly.

In the view of the American Jewish Committee, the charitable choice approach to Government funding of social services is an unconstitutional breach of the principle of separation of church and state and just plain bad public policy. It eliminates longstanding and important church-state and anti-discrimination safeguards that have historically been in place when Government dollars flow to religiously affiliated organizations.

Perhaps as crucially, there is a conceptual paradox at the heart of charitable choice. It is an approach that seeks to allow Government to utilize the spiritual ministry of churches, synagogues and other pervasively religious institutions as a tool in the provision of social services, while at the same time assuring that the programs are administered in a fashion that protects beneficiaries of these services from religious coercion and protects religious institutions from undue interference by the state. This is an approach to social services provision that is untenable because of the practical, to say nothing of the constitutional problems posed by any effort to reconcile these inconsistent goals.

Given all these problems that charitable choice presents, the irony is that, in light of the longstanding partnership between Government and religiously affiliated organizations, it is an approach that is simply unnecessary.

Our concerns about charitable choice do not reflect any lack of high regard for the important work that religious institutions do in providing social services, nor an effort to erect an impassable barrier to cooperation between those institutions and the Government in the provision of services.

In fact, religiously affiliated organizations have received Government funds to provide services under the standards and practices that both incorporate proper anti-discrimination and church-state safeguards, and preserve the religious identities of the providers.

In addition, there are non-financial ways in which the Government can cooperate with any religious organization, as set forth in the document "In Good Faith: A Dialogue on Government Funding of Faith-Based Social Services," in which AJC participated in preparation with supporters of charitable choice and which I ask be made part of the record.

Senator SCHUMER. Without objection.

Mr. FOLTIN. When it comes to the transfer of funds, however, to pervasively religious organizations, first, I want to note that the reports of the demise of the pervasively religious organization test are greatly overstated, to paraphrase Mark Twain.

There is still not only longstanding practice, but judicial precedent that tells us that, contrary to what charitable choice does, it is not appropriate to permit houses of worship and other pervasively religious institutions to receive taxpayer dollars for provision of social services.

The Supreme Court has repeatedly affirmed that such funding amounts to an unconstitutional advancing of religion because of the substantial risk that Government funding, even if it is designated for specific secular purposes, may nonetheless advance the pervasively sectarian institution's religious mission. Although the great bulk of these cases had to do with schools, one important case in this area, *Bowen* v. *Kendrick*, explicitly had to do with a social service provider.

Moreover, and while, of course, there is not time to go into this now, I think the argument that somehow the *Mitchell* case has undone this notion of looking to the nature of the institution receiving the service simply does not hold up to a fair analysis of the concurring opinion of Justice O'Connor, taken together with the dissent.

Now, beyond these concerns, charitable choice presents an additional problem. When institutions with a thoroughly religious environment provide social services, recipients of those services may be coerced either explicitly or tacitly to take part in religious activities as a price of receiving services. None of the purported safeguards in charitable choice are adequate to deal with these issues, as is laid out in my testimony.

Let me just conclude by turning for a moment to the issue of discrimination. Charitable choice allows religious providers to make employment decisions based on religion with respect to the employees hired to provide taxpayer-funded services. Religious institutions are appropriately permitted to prefer co-religionists in hiring decisions under the limited exemption of Title VII that recognizes the powerful religious liberty interests involved.

It was important that those provisions were in Title VII, and we would defend them to any extent they ever were under attack. But the explicit extension of that exemption to cover employees providing publicly-funded services as part of a program premised on substantial expansion of the role of pervasively religious organizations in social services provision runs counter to fundamental civil rights principles. The issue here is not one of bigotry by the religious institutions, but of the proper role of Government and the kinds of services that it funds.

Senator SCHUMER. Thank you, Mr. Foltin.

I want to thank all of the witnesses. I think it was done in a rather shortened way, abbreviated way, but I think we had excellent testimony that drew the issues to a head.

I apologize. I have so many questions, and I know other members do. On this day, as you can see, we are busy. I have an amendment on the floor that they are holding up debate on the floor until I get over there. So what we are going to do is two things; first, put the entire statements in the record. I am going to ask every one of my colleagues to read them because I think it draws the issues. We had a direct meeting of the issues in the testimony here.

Second, we are going to be submitting written questions to every one of the witnesses which will be made part of the record.

With that, I thank you for your patience, and look forward to continuing the dialogue on this issue.

Our hearing is adjourned.

[Whereupon, at 1:03 p.m., the Committee was adjourned.]

[Questions and answers follow:]

QUESTIONS AND ANSWERS

Responses of Richard T. Foltin to questions submitted by Senator Leahy

Question 1: You are familiar with the statement attributed to a White House aide implying that, under the President's proposals, government dollars could be used to pay for light bulbs while private funds pay for Bibles. Do you think it is constitutional for a religious provider to receive federal dollars for a program in which the federal funds are not put toward proselytizing, but private funds or volunteer support are used for activities that are religious in nature?

Answer: As a preliminary matter, it remains constitutionally problematic for government dollars to flow directly to religious organizations whose religious mission is inextricably linked with their operations, i.e., what the Supreme Court has termed "pervasively sectarian organizations." But, regardless of the nature of the funded institution (that is, even if the organization is one that is religiously affiliated but not pervasively religious), it also remains the case that public funds may not be used to promote religious doctrines. That prohibition may not be evaded through what amounts to a bookkeeping trick in which federal funds are used for the secular aspects of the program, while that same program includes religious elements, such as proselytization, that are ostensibly supported by private funds or volunteer activity. Such an evasion would give rise, I submit, to an "as applied" constitutional challenge that the program was administered in a way that led to violations of the Establishment Clause.

Question 2: Proponents of "charitable choice" point to the fact that it has been on the books for five years as evidence that it is benign and will not lead to excessive litigation. How do you respond?

Answer: The relative lack of controversy since "charitable choice" was first enacted in 1996, as part of the welfare reform law, tells us nothing about either the benignity or the potential for litigation of this initiative. By all reports, churches and other religious organizations have not been racing to enter into contracts with government, perhaps in part because religious leaders have recognized the dangers and the potential for litigation posed by "charitable choice." Moreover, the programs supported by the "charitable choice" measures enacted since 1996 serve, by definition, persons who are in extremis and who are, therefore, least likely to raise problems with undue impositions on their religious principles. Nevertheless, we have begun to see a number of cases filed in the courts involving concerns of the type raised in my testimony about discrimination and government funds being used to support religion-teaching activities. As the number of "charitable choice" contracts increases—a likely scenario given that the current administration supports a broad extension of this approach and has a different view than the previous administration as to what kinds of institutions may constitutionally receive public funds—we should expect to see a rise in the number of lawsuits.

Question 3: At the hearing we heard the view that the Supreme Court has backed away from its holding that government funds should not flow directly to "pervasively sectarian organizations," and a related suggestion that we should not expect the Court to trust government funding of pervasively religious social service providers to be treated in the same fashion as government funding of religious schools. What do you think of these characterizations of the current state of the law?

Answer: While it would be foolish to claim that the current condition of church-state is one of pristine clarity, the reports of the demise of the "pervasively sectarian organizations" standard are greatly exaggerated. The three dissenters in last year's Supreme Court decision in *Helms* v. *Mitchell* clearly want to adhere to that framework of analysis, and it is difficult to reconcile the concurrence of Justices O'Connor and Breyer with the plurality's call for that approach to be discarded.

The concurrence pointedly distinguishes a situation, such as that in Helms, involving the loan of federally-funded computers to religious schools, from situations involving the flow of government funds to such institutions. As Justice O'Connor noted in her concurring opinion, "Our concern with direct monetary aid [to religious schools] is based on more than just [concern about] diversion [of taxfunded aid to religious use]. In fact, the most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition." Thus, at least as to religious schools, the notion that certain religious organizations should not directly receive public funds has not been overturned. Since Justice O'Connor was dealing in Helms with aid to religious schools, an area dealt with directly by the courts in numerous cases, there was no need for her to deal with the general issue of the "pervasively sectarian organization" standard. But these concerns about funding "fall[ing] precariously close to the original object of the Establishment Clause's prohibition" apply equally to houses of worship and similar institutions that are, at least as much as religious schools, paradigmatically "pervasively sectarian."

Question 4: It has been suggested that the view that religious institutions ought not to discriminate on the basis of religion with respect to persons hired to provide government funded social services somehow casts aspersions on all hiring decisions made by religious institutions on the basis of religion—even when with private funds—as manifestations of "religious bigotry." Is this a fair statement of how you, as an opponent of "charitable choice," view those hiring decisions?

Answer: No. My objection to the fashion in which "charitable choice" allows religious organizations to discriminate on the basis of religion with respect to persons hired to provide government funded social services does not reflect a view that religious organizations manifest "religious bigotry" when they invoke the Title VII exemption that allows religious organizations to prefer members of their own faith in making hiring decisions.

In his concurring opinion in Corporation of Presiding *Bishop* v. *Amos*, 483 U.S. 327 (1987) (upholding the constitutionality of the Title VII exemption), Justice Brennan, joined by Justice Marshall, citing an article by Professor Douglas Laycock said, "[r]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] [C]lause.'" Justice Brennan went on, "[A religious] community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well." Thus, it is a fundamental aspect of the religious freedom that is protected as our first liberty in the First Amendment that religious organizations, the vehicle through which religious communities manifest their religious missions, should be able to demand that the individuals they hire to work for those organizations subscribe to the creed and practices of their faith. Such a demand is not a manifestation of "religious bigotry" but, rather, a reflection of the need to maintain the integrity of the organization.

Explicit extension of the exemption to cover employees providing publicly funded services is not required by the concerns addressed in Amos. Much of the Amos analysis, as amplified in the concurring opinions, turns on the problems that would be posed in limiting the exemption to religious activities of a religious organization, not the least of which would be placing the state in the position of parsing which activities of the organization are secular and which are religious. With respect to programs funded by the government, however, the state, as a matter of constitutional principle, may fund only the secular activities of religious organizations, thereby making unnecessary an explicit extension of the Title VII exemption to employees providing publicly funded services. To the contrary, such an explicit extension, as part of a program premised on substantial expansion of the role of pervasively religious organizations in social services provision, would run counter to fundamental civil rights principles, as well as identify the government with using religious criteria for employment. It is these concerns that underlie our opposition to the provisions of "charitable choice" that deal with employment discrimination, and not any view that religious organizations manifest "religious bigotry" when they rely on religious criteria in making employment decisions.

Responses of Richard T. Foltin to questions submitted by Senator Kennedy

Question 1: Many of our most vulnerable citizens—drug and alcohol addicts, the mentally ill, and those living in poverty, will be the ones seeking the services provided by faith based organizations. Considering this fact, I would like the panelists to address how this legislation does or does not protect and ensure the rights of these individuals? Specifically, either from experience or from your understanding of the legislation, can you describe the process by which an individual who objects to religious treatment would be able to opt-out? Is the burden on the individual—who may or may not be competent to affirmatively assert his or her objections, or does the provider have an obligation to explain the methods to the individual and ascertain whether he or she objects to religious treatment? Does the faith based provider have an obligation to notify the individual that there is an alternative, non-faith based organization, or are we relying on the individual's knowledge of his or her rights? If the individual is a minor or is mentally incompetent, is there a duty to receive a waiver from a parent, guardian or custodian?

Answer: Proponents of "charitable choice" have pointed to several provisions of 5.304 as affording sufficient protection for persons receiving government-funded services from religious coercion. But these ostensible protections, including prohibitions on the use of program funds for "sectarian worship, instruction or proselytization" and on discrimination against beneficiaries on the basis of religion, as well as the requirement that beneficiaries of social services shall be entitled to have those services provided by "an alternative organization," are simply insufficient.

As to the prohibitions on use of funds for sectarian purposes and on discrimination, it is not reasonable to expect pervasively religious institutions to provide for a separation between the provision of secular social services for which taxpayer dollars are used and the religion-teaching activities of those organizations. Moreover, nothing in "charitable choice" precludes privately funded religious activities from taking place in and around the services paid for with public funds in a fashion that will suggest strongly to beneficiaries that these are activities in which they ought to be engaged.

With respect to the requirement that assistance be made available from "an alternative organization that is accessible to the individual," this requirement is pregnant with unanswered questions such as: must the alternative provider be secular, is the alternative provider to be made available on an ongoing basis or simply created as individuals object to an offered religious provider, who shall pay for the establishment of the alternative provider, and what type of burden will be imposed on the beneficiary to confirm his or her religious objection? This lack of clarity as to the particulars of the requirement that an alternative provider be made available makes it difficult to answer this and the subsequent questions as to how this structure should work. We should, therefore, approach with great suspicion any assurance by proponents that this structure will sufficiently protect the rights of individuals.

In any event, it is, frankly, difficult to believe that alternative providers will always be reasonably available, if available at all, particularly in rural or homogenous areas, whatever S.304 may say. It is important to recall as well, that the recipients of services provided under "charitable choice" are often in extremis. They may not clearly understand their options and their rights, they may be subject to pressure from government officials and peers not to "make waves," and they may be reluctant to take steps that might delay or obstruct their receipt of badly needed services.

Turning, then, to the specific queries at the end of question one, it really is not feasible to describe, after reading the legislation (which is similar to the provisions that have been appeared in other bills that include "charitable choice "), the process by which an individual who objects to religious treatment would be able to opt-out. Certainly, nothing in the bill precludes state and local officials who are administering a program from placing the burden on the individual to affirmatively assert his or her objections. The bill does provide for some form of notice to beneficiaries, which is an improvement over earlier "charitable choice" initiatives, but, again, lacks, specificity or clarity. At the most basic level, we are not told how the determination is to made which is the "appropriate Federal, State, or local governmental entity" to provide notice.

Question 2: S.304 states that an individual has a right to "an alternative organization that is accessible to the individual." What is your understanding of what constitutes an acceptable "alternative" organization? When comparing a faith based organization and a non-faith based organization, what factors do you believe are most significant in determining whether that organization is an acceptable alternative (i.e., number of individuals served, comparable funding, number of staff members, success rates)?

Answer: The bill provides no clear standard as to what will constitute an acceptable alternative organization, other than to say that the organization shall be "accessible" and that the assistance provided by that organization shall have "a value that is not less than the value of the assistance that the individual would have received from such organization." Certainly, the factors suggested in question 2 are among those that should be considered in determining what is acceptable, but perhaps as crucial as the question of what is acceptable is the question of who decides what is acceptable. Is acceptability to be determined by the beneficiary, a federal rule-making agency, or the state or local agencies responsible for administering the program? And how is this determination to be policed? Are the courts, in the end, going to be responsible for resolving a dispute as to whether an acceptable alternative has been offered? To the extent a challenge to acceptability turns on a challenge being made by the beneficiary, all of the concerns as to barriers to objections by beneficiaries raised above apply.

Question 3: Continuing with the provision addressed in question 2, how "accessible" must the non-faith based organization be to the individual? For example, if an individual objects to a faith based organization walking distance from where he or she lives, does the city and/or state have an obligation to provide an alternative within walking distance? In the same city or town? Same county? Same state? Furthermore, does the city or state have an obligation to provide transportation if that individual is unable to get to the secular organization?

Answer: These are, again, questions that the bill does not resolve. These answers will have to be provided by a federal rule-making agency or the state administrator, with disputes to be resolved in the courts.

Question 4: The legislation provides that these alternative services must be provided in a "reasonable period of time after the date" an individual files an objection to the faith based services. Under this provision, for example, what happens to the drug or alcohol addict during the time period between when a complaint is lodged and when an alternative organization is established. Does that individual have to choose between asserting his rights or receiving urgent care and treatment?

Answer: Once again, questions that the bill does not resolve. But, clearly, a huge problem is presented in terms of the acceptability of an alternative provider if that alternative is not available to those in need of urgent care and treatment. The only way to guard against inequities in terms of the provisions of services is to create alternative providers at the same time as faith-based services receive contracts. But this is an approach that would bring it with all sorts of difficulties in funding and inefficiencies.

Question 5: Do you believe the enforcement mechanism in the legislation is adequate? Do you think it is effective and realistic to rely on individuals—many of whom lack the financial ability and personal desire to file a lawsuit—to ensure compliance with the legislation. What other enforcement mechanisms might exist?

Answer: No enforcement mechanism is explicitly provided other than the private cause of action that may be available under subsection (g). Plainly, as the question reflects and as I stated in my response to question 1, that is a palpably inadequate enforcement mechanism. Absent the creation of a federal authority to ensure compliance, it is difficulty to know what mechanism would actually assure adequate safeguarding of the right to an acceptable alternative.

U.S. Department of Education
Office of Educational Research and Improvement (OERI)
National Library of Education (NLE)
Educational Resources Information Center (ERIC)

ERIC
Educational Resources Information Center

NOTICE

Reproduction Basis

☐ This document is covered by a signed "Reproduction Release (Blanket)" form (on file within the ERIC system), encompassing all or classes of documents from its source organization and, therefore, does not require a "Specific Document" Release form.

☒ This document is Federally-funded, or carries its own permission to reproduce, or is otherwise in the public domain and, therefore, may be reproduced by ERIC without a signed Reproduction Release form (either "Specific Document" or "Blanket").

EFF-089 (5/2002)